TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 218. 86

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER, AND PAUL LEON ROEDERER, PLAINTIFFS IN ERROR,

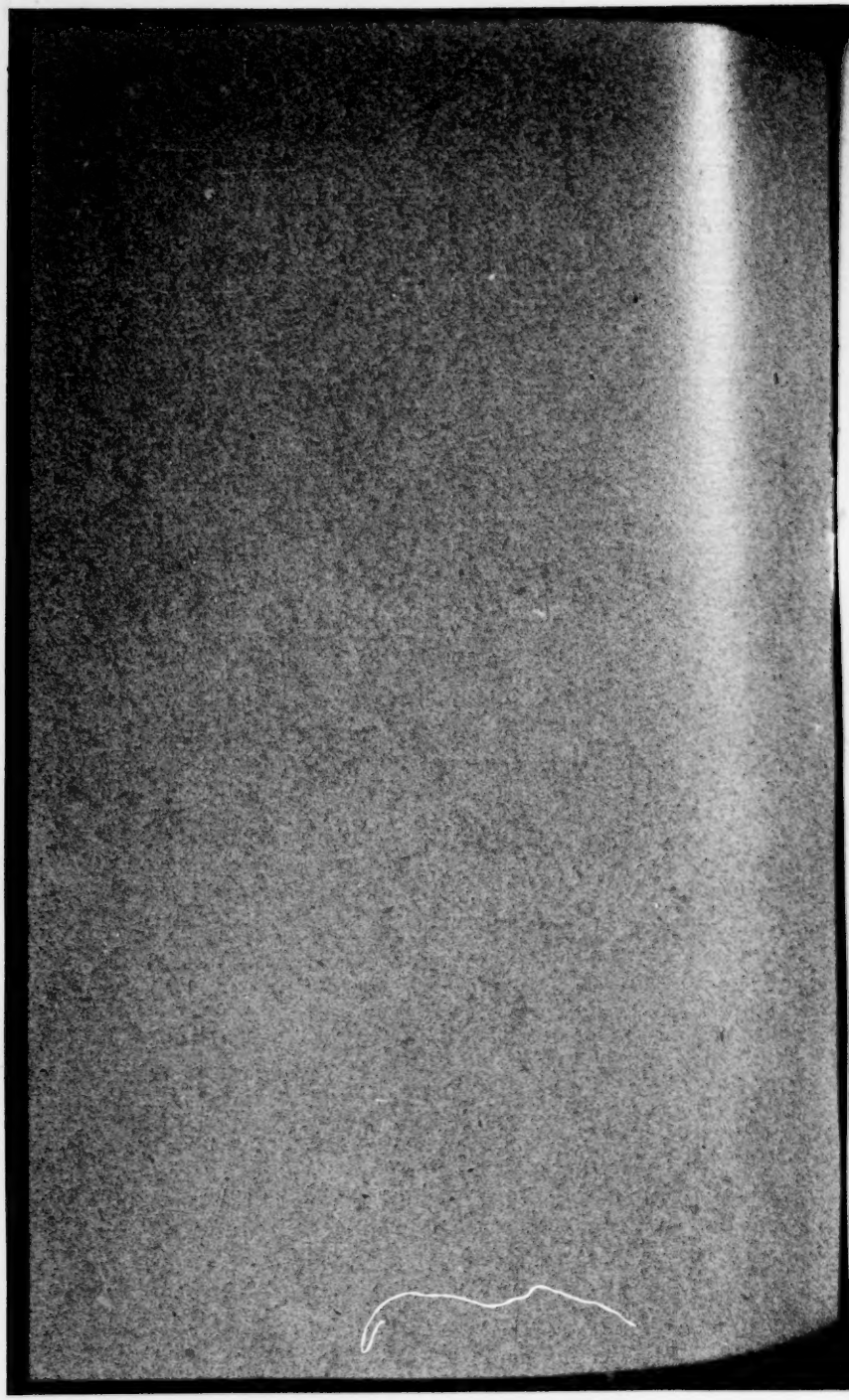
vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JUNE 19, 1900.

(17,803.)



(17,803.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 318.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER, AND PAUL LEON ROEDERER, PLAINTIFFS IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the southern district of New York	1	1
Writ of error	1	1
Clerk's certificate and return	2	2
Præcipe for summons	3	2
Summons	4	3
Complaint	5	3
Answer	8	5
Minute entry of trial	11	6
Judgment	12	7
Bill of exceptions	13	7
Evidence for plaintiffs	13	8
Exhibits offered	13	8
Testimony of Frederic E. Mygatt	14	8
Henry L. Zander	15	8
Robert J. Perkins	16	10
Robert J. Perkins (recalled)	19	11
C. G. Miller	23	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 24, 1900.

	Original.	Print
Testimony of S. V. Fornaris	48	31
Alexander Harris	51	33
John G. Woods	54	35
L. C. Fallon	57	37
George R. Westfeldt	58	38
Matthew Warriner	58	38
C. G. Miller (recalled)	71	47
Alfred Le Blanc	71	47
W. J. Hammond	81	54
W. P. Ross	93	62
M. J. Sanders	101	67
Joseph W. Coffey	106	71
Paul J. Lecorgne	116	78
John C. Trainor	124	83
John Ellis	129	86
John Nie	132	88
John Stytch	138	92
John Reinhard	143	95
William Reinhard	146	97
Charles K. Lincoln	149	99
George H. Kent	157	104
M. J. Sanders (recalled)	163	108
L. Herzog	167	111
John Gassenberger	169	112
Thomas N. Boylan	174	116
Robert E. Kerkam	177	118
Thomas N. Boylan (recalled)	180	120
W. J. O'Connor	188	125
James P. McArdle	199	133
Charles E. Satterlee	212	143
Thomas N. Boylan (recalled)	220	149
P. A. Robeau	224	151
Plaintiffs rest	236	162
Motion of defendant for verdict	236	162
Ruling of the court	237	162
Motions of plaintiffs and rulings thereon	241	165
Plaintiffs' Exhibit A—Stipulation of March 23, 1897	245	168
B—Bill of lading	248	169
C—Invoice	254	175
D—Contract	255	176
D^1—Contract	255	176
D^2—Contract	256	177
E—Stipulation of January 3, 1899	257	177
F—Map	259	178
G, 1 to 6—Diagrams—Berthing reports	260	178
H—Insurance reports	267	179
K—Waybill	279	189
L—Waybill	280	190
M—Letter, Boylan to Smith, November 13, 1894	281	191
N—Telegram, Thorne to Satterlee, November 12, 1894	286	194

	Original.	Print
Plaintiffs' Exhibit O—Telegram, Thorne to Satterlee, November 14, 1894	286	194
P—Telegram, Thorne to Satterlee, November 13, 1894	287	195
Q—Telegram, Satterlee to Gould, November 16, 1894	288	195
R—Letter, Satterlee to Thorne, October 15, 1894	289	195
S—Letter, Thorne to Satterlee, October 19, 1894	290	196
T—Telegram, Thorne to Satterlee, October 21, 1894	291	197
U—Letter, Thorne to Satterlee, October 20, 1894	292	197
V—Telegram, Thorne to Satterlee, November 6, 1894	293	197
W—Letter, Satterlee to Thorne, November 9, 1894	293	198
X—Telegram, Satterlee to Thorne, November 10, 1894	295	199
Y—Telegram, Thorne to Satterlee, November 10, 1894	295	199
Z—Telegram, Thorne to Satterlee, November 10, 1894	296	200
A A—Letter, Thorne to Satterlee, November 11, 1894	297	200
No. 36—Form of contract	299	202
Judge's certificate to bill of exceptions	300	202
Stipulation as to bill of exceptions	300	202
Assignment of errors	301	202
Bond for damages and costs	306	205
Citation	309	207
Opinion	311	207
Judgment	316	210
Assignment of errors	318	211
Bond on writ of error	325	213
Citation and service	330	216
Clerk's certificate	332	217
Writ of error	333	217

a United States Circuit Court of Appeals for the Second Circuit.

LOUIS AUGUSTE MARANDE ET AL., Plaintiffs in Error,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant in Error.

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

United States circuit court of appeals, second circuit. Filed Feb. 7, 1900. William Parkin, clerk.

1 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer, plaintiffs, and The Texas and Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer, as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 15th day of February, 1900, that, the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22d day of January, in the year of our Lord one thousand nine hundred, and of the In-
2 dependence of the United States the one hundred and twenty-fourth.

JOHN A. SHIELDS.
[L. S.] *Clerk of the Circuit Court of the United States of America for the District of New York, in the Second Circuit.*

The foregoing writ is hereby allowed.
E. HENRY LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 309, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer, plaintiffs in error, against The Texas and Pacific Railway Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this third day of February, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

[L. S.] JOHN A. SHIELDS, *Clerk.*

(Stamp.)

(Endorsed:) The U. S. circuit court of appeals for the second circuit. Louis Auguste Marande and others, plaintiffs in error, *vs.* The Texas and Pacific Railway Company, defendant in error. Writ of error. Evarts, Choate & Beaman, attorneys for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 23d day of January, 1900. Rush Taggart, attorney for defendant in error. U. S. circuit court. Filed January 23, 1900. John A. Shields, clerk.

3

Circuit Court of the United States for the Southern District of New York.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER, PAUL LEON Roederer
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

John A. Shields, clerk circuit court U. S., southern district of N. Y.:

You will please issue a summons to the defendant, The Texas and Pacific Railway Company, in the above-entitled action.

EVARTS, CHOATE & BEAMAN,
Attorneys for Plaintiffs.

Office and post-office address, No. 52 Wall street, borough of Manhattan, New York city.

(Endorsed:) Circuit court U. S., southern district of N. Y. Louis Auguste Marande *vs.* The Texas Pacific R'w'y Co. Præcipe for summons. Evarts, Choate & Beaman, attorneys for plaintiffs. U. S. circuit court. Filed Dec. 6, 1895. John A. Shields, clerk.

4 United States Circuit Court, Southern District of New York.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER, PAUL LEON ROEDERER
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of New York, the 6th day of December, in the year one thousand eight hundred and ninety-five.

[L. S.] JOHN A. SHIELDS, *Clerk.*
EVARTS, CHOATE & BEAMAN,
Plaintiffs' Attorneys.

Office and post-office address, No. 52 Wall street, New York city.

5 United States Circuit Court, Southern District of New York.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER, PAUL LEÓN ROEDERER
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

The plaintiffs herein, by Evarts, Choate & Beaman, their attorneys, complain of the defendant, The Texas and Pacific Railway Company, and allege, upon information and belief, as follows:

First. At all the times hereinafter mentioned, the plaintiffs were and are now partners doing business as cotton merchants in the city of Havre, France, under the firm name of Roederer Frères A. Marande & Co., and are citizens of the Republic of France.

Second. At all the said times the defendant was and now is a railroad corporation duly created and existing under and by virtue of an act of Congress of the United States of America, approved March 3, 1871, and was and is now engaged in conducting the business of a common carrier of merchandise for hire from various places in the State of Texas to Westwego, in the State of Louisiana, and was and is an inhabitant of the southern district of New York.

Third. Heretofore, and in the month of October, 1894, at Greenville, in the State of Texas, the plaintiffs delivered to the
6 said defendant as such common carrier 100 bales of cotton, weighing 54,063 pounds, and the defendant then and there received the same, and then and there undertook and agreed, as a common carrier as aforesaid, to carry the same, safely and securely, at a through price or rate of freight from the said place of shipment

to Havre, France, by way of New Orleans, and thence to Havre, France, by the Elder, Dempster & Co.'s line of steamships, and there to deliver the same to the plaintiffs upon the payment of freight therefor.

Fourth. The said defendant has failed to keep its said agreements and to carry safely 65 of said bales of cotton to Havre aforesaid, and there deliver the same to the plaintiffs, although the plaintiffs have duly demanded delivery thereof, and although they have been at all times ready and willing to pay the said freight for such carriage; and, through the negligence and carelessness of the defendant and without the fault of the plaintiffs, said 65 bales of said bales of cotton weighing upwards of 35,141 pounds, and of the value of two thousand three hundred and fifty-two $\frac{24}{100}$ dollars, were, on or about the twelfth day of November, 1894, wholly destroyed by fire at Westwego, in the State of Louisiana aforesaid, at which time and place the same were in the possession of the defendant in the course of such carriage and as a common carrier as aforesaid. The bales so destroyed were marked as follows: 65 bales marked DIXO.

Fifth. The plaintiffs have duly demanded the payment to them by the defendant of the said value of the said 65 bales of cotton thus destroyed, and have duly performed all the acts necessary for them to do under and by virtue of said agreements, but the defendant has refused to pay the plaintiffs the value of the bales of cotton destroyed as aforesaid, or any part thereof, although the defendant has admitted that said bales of cotton were destroyed by fire at Westwego aforesaid.

7 Wherefore the plaintiffs demand judgment against the defendant for the sum of two thousand three hundred and fifty-two and $\frac{24}{100}$ dollars, with interest thereon from the 12th day of November, 1894, besides the costs of this action.

EVARTS, CHOATE & BEAMAN,
Attorneys for the Plaintiffs, No. 52 Wall Street,
New York City, New York.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } *ss.:*

I, Treadwell Cleveland, being duly sworn, depose and say as follows: I am one of the attorneys and of counsel for the plaintiffs in the above-entitled action, and have read the foregoing complaint and know the contents thereof; the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. The grounds of my belief as to all the matters in said complaint not stated upon my knowledge are as follows, namely, the possession of the original documents relating to the shipment and value of the cotton and communications received from the defendant and others in relation to its destruction.

The reason why this verification is not made by the plaintiffs is that the plaintiffs do not reside and are not now within the city and county of New York, where the plaintiffs' attorneys reside or have their office.

TREADWELL CLEVELAND.

Sworn to before me this 12th day of December, 1895.

MARVELLE C. WEBBER,
[SEAL.] *Notary Public, New York County.*

(Endorsed:) United States circuit court, southern district of New York. Louis Auguste Marande, Jules Emile Roederer, Paul Leon Roederer against The Texas and Pacific Railway Company. Summons and complaint. Evarts, Choate & Beaman, No. 52 Wall street, New York city, attorneys for the plaintiffs. U. S. circuit court. Filed Jan. 3, 1896. John A. Shields, clerk.

8

United States Circuit Court, Southern District of New York.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER, PAUL LEON ROEDERER, Plaintiffs,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

The above-named defendant, by Rush Taggart, its attorney (protesting, however, that the court is without jurisdiction for the reason that the defendant is not an inhabitant of the southern district of New York, and not consenting to the said jurisdiction), answers the complaint herein as follows:

First. Said defendant has no knowledge or information sufficient to form a belief as to any or either of the allegations contained in the paragraph or subdivision of said complaint designated first.

Second. The said defendant admits the allegations contained in the paragraph or subdivision of said complaint designated second, save and excepting the allegation that the defendant was and is an inhabitant of the southern district of New York, which said allegation defendant denies.

9

Third. Said defendant admits that heretofore and in the month of October, 1894, at Greenville, in the State of Texas, there was delivered to the defendant by the plaintiff certain cotton, being the number of bales specified in the paragraph or subdivision of said complaint designated third and destined as therein stated, but that defendant has no knowledge or information sufficient to form a belief as to the weight of said cotton, and the defendant denies each and every other allegation contained in the said paragraph or subdivision of said complaint.

Fourth. Said defendant admits that sixty-five bales of said cotton, marked as described in the paragraph or subdivision of the said complaint designated fourth, were destroyed by fire at Westwego, in the State of Louisiana, on or about the 12th day of November, 1894; but the defendant denies each and every other allegation in the said paragraph or subdivision contained.

Fifth. Said defendant admits the allegation contained in the paragraph or subdivision of said complaint designated fifth, to the effect that it has refused to pay the plaintiff the value of the cotton destroyed as aforesaid, although admitting that it was destroyed by fire at Westwego; but said defendant denies each and every other allegation in the said fifth paragraph or subdivision contained.

Wherefore, the defendant demands that said complaint may be dismissed, with costs.

RUSH TAGGART,
Attorney for the Defendants, No. 195 *Broadway, New York, N. Y.*

10 SOUTHERN DISTRICT OF NEW YORK, } ss.:
City and County of New York, }

Charles E. Satterlee, being duly sworn, says: That he is an officer of the defendant above named, The Texas and Pacific Railway Company, to wit, the treasurer thereof; that he has read the foregoing answer and knows the contents thereof; that the same is true, excepting as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. E. SATTERLEE.

Sworn to before me this 3d day of November, 1895.

B. W. J. FOX,
[SEAL.] *Notary Public, Kings County, N. Y.*

Certificate filed in New York county.

(Endorsed:) United States circuit court, southern district of New York. Louis Auguste Marande, Jules Emile Roederer, Paul Leon Roederer, plaintiffs, *vs.* The Texas and Pacific Railway Company, defendant. Answer. Rush Taggart, attorney for defendant, 195 Broadway, New York. To Evarts, Choate & Beaman, Esqs., plaintiff's attorneys. Service of a copy of the within answer is hereby admitted this 6th day of Jan., 1896. Evarts, Choate & Beaman, attorneys for pl'ff. U. S. circuit court. Filed Jan. 6, 1896. John A. Shields, clerk.

11 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-room, in the borough of Manhattan, in the city of New York, on Wednesday, the 31 day of January, in the year of our Lord one thousand nine hundred.

Present: The Honorable E. Henry Lacombe, circuit judge.

LOUIS A. MARANDE ET AL. }
vs. }
TEXAS AND PACIFIC RAILWAY COMPANY. }

Now comes the plaintiffs by Treadwell Cleveland, Esq., their attorney, and move the trial of this cause. Likewise comes the defendant by Rush Taggart, Esq., its attorney.

Thereupon a jury is empaneled and the cause proceeds to trial.

After hearing the evidence for the plaintiffs and the argument of counsel the jury on Tuesday, January 9, 1900, by direction of the court, say they find a verdict for the defendant. Thereupon the court grants the plaintiffs a stay of sixty days within which to make

and serve a case, with leave to turn the same into a bill of exceptions.

(An extract from the minutes.)

[SEAL.] JOHN A. SHIELDS, *Clerk.*

12 United States Circuit Court for the Southern District of New York.

LEWIS A. MARANDE, Plaintiff,
against
THE TEXAS AND PACIFIC RAILWAY Company, Defendant. } Judgment, Dated Jan. 3, 1900.

The issues in this action having duly come on to be tried on the second day of January, 1900, before Hon. E. Henry Lacombe, United States circuit judge and a jury, and the trial thereof having duly proceeded on the 3d day of January, 1900, and on the days subsequent thereto, and on the 9th day of January, 1900, the jury having, by direction of the court, duly rendered a verdict in favor of the defendant and against the plaintiff, and the defendant's costs having been duly adjusted in the sum in that behalf hereinafter mentioned: now, on motion of Rush Taggart, Esq., attorney for the defendant,

Ordered and adjudged, that the defendant, The Texas and Pacific Railway Company, recover from the plaintiff, Lewis Marande, the sum of $259.25 *dollars*, defendant's costs and disbursements, as adjusted, and that defendant have execution against said plaintiff therefor.

Judgment signed and entered this 16th day of January, 1900.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States circuit court, southern district of New York. Lewis A. Marande against The Texas and Pacific Railway Company. Judgment. U. S. circuit court. Filed Jan. 16, 1900, 3.55 p. m. John A. Shields, clerk.

13 United States Circuit Court, Southern District of New York.

LOUIS AUGUSTE MARANDE, JULES EMILIE Roederer, and Paul Leon Roederer, Plaintiffs,
against
THE TEXAS AND PACIFIC RAILWAY Company, Defendant. } Bill of Exceptions.

Be it remembered that at a stated term of this court, held at the United States court-rooms in the borough of Manhattan, in the city of New York, on Wednesday, the third day of January, 1900, the issues in this cause came on for trial before the Honorable E. Henry Lacombe, circuit judge, and a jury, duly empaneled and sworn, and, thereupon the plaintiffs, by their counsel, having opened their case to the jury, to maintain the issues on their part, offered the following evidence, to wit:

Plaintiffs' counsel offers in evidence a stipulation by the counsel of the respective parties as to the bill of lading, dated March 23, 1897.

Marked Exhibit A (printed *post*, at pp. 245 *et seq.*).

Plaintiffs' counsel offers in evidence the bill of lading covering the cotton in suit, dated October 29, 1894.

Marked Exhibit B (printed *post*, at pp. 248 *et seq.*).

14 Plaintiffs' counsel offers in evidence invoice, dated October 27, 1894.

Marked Exhibit C (printed *post*, at pp. 254 *et seq.*).

Plaintiffs' counsel offers in evidence contract No. 73, referred to in the bill of lading, dated October 27, 1894.

Marked Exhibits D, D 1 and D 2 (printed *post*, pp. 255 *et seq.*).

Plaintiffs' counsel offers in evidence a stipulation dated January 3, 1899, in relation to the subject of jurisdiction and value of cotton, &c.

Marked Exhibit E (printed *post*, at pp. 257 *et seq.*).

FREDERIC E. MYGATT, sworn and examined as a witness for the plaintiffs, testified as follows:

Direct examination by Mr. CLEVELAND:

I am a counsellor-at-law, and one of the assistants of the plaintiffs' attorneys. I have made a computation as to the value of the cotton included in this action. The weight of the cotton, according to the stipulation, is 35,141 pounds. The price current at New Orleans on the date of the bill of lading, October 29, 1894, was $5\frac{9}{16}$ cents per pound; adding one-fourth of a cent for staple, makes $5\frac{13}{16}$ cents per pound. I have multiplied the weight by the price per pound. That makes $2,042.57, the gross value of the cotton. From that I have subtracted the freight at the rate of 75 cents per hundred pounds, which amounts to $263.56; leaving the net value of the cotton, $1,779.01. To that I have added interest from November 12, 1894, amounting to $548.90; making a total of $2,327.91.

15 HENRY L. ZANDER, sworn and examined as a witness for the plaintiffs, testified as follows:

Direct examination by Mr. CLEVELAND:

I reside in New Orleans, and have resided there pretty nearly all my life. I am an engineer and surveyor, and have come here at the request of the plaintiffs in this action. I have made a map of that portion of the Mississippi river in the city of New Orleans, including Westwego; and this is the paper which I now show you.

Plaintiffs' counsel offers in evidence the map referred to, except the printed part.

Marked Exhibit F (inserted *post*, at page 259).

Q. Will you please explain what you have done upon that map in relation to the act of Congress approved March 20, 1896, a part of which purports to be copied upon the map?

A. I was asked to make a map of the city of New Orleans and the adjacent parish, showing the port of entry as referred to by act No. 53 here, a copy of which was given me, as I am a surveyor for the city of New Orleans also; a Government map, which was composed of some of the surveys that were made by ourselves and some of the Government surveys; and then I transcribed on that map the act as here indicated. I colored that portion with a wash, to show the port of entry, which is indicated on the map.

Q. This act reads: "That the limits of the port of entry of New Orleans shall be, and the same are hereby extended so as to include that portion of the parish of Jefferson on the west bank of the Mississippi river lying between the upper line of the parish of Orleans, west bank; the west bank of the said river to a point opposite the upper boundary line of the parish of Orleans east bank, a line drawn thence back four thousand feet, perpendicular to said river, and a line drawn thence parallel to the Mississippi river until
16 it intersects said upper parish boundary line, west bank." That is what you have done?

A. I have done that. I have erected a perpendicular line at the upper boundary line of the parish of Orleans on the east bank, and extended it across the river, and prolonged it four thousand feet; then drew a line parallel with the west bank of the Mississippi river until it intersects the upper boundary line of the parish of Orleans on the west bank of the Mississippi river, indicating all that portion of land in the parish of Jefferson which was entered as a part of the port of entry in this act. They have some portion on the east bank, but that does not refer to the west bank.

Q. Then the yellow portion of this map accurately represents the property described in the act?

A. Yes, sir.

Mr. CLEVELAND: Let it appear that the act was approved March 20th, 1896. That is, two years after this fire the limits of the port of entry of New Orleans were extended. Do you concede as a matter of fact that the east bank of the river in the city of New Orleans is the port of New Orleans and was the port of New Orleans in 1894?

Mr. TAGGART: I concede that, yes.

Mr. CLEVELAND: Do you concede that Westwego was not within the port of New Orleans as defined by the statutes of the United States, in 1894?

Mr. TAGGART: I concede that prior to March 20, 1896, it (Westwego) was not within the designated limits of the port of entry, the customs district, as defined by the act of Congress. That is, of course, subject to objection and exception as to its materiality. I reserve my objection.

ROBERT J. PERKINS, called as a witness for the plaintiffs, testified as follows:

Direct examination by Mr. CLEVELAND:

I am an attorney and counsellor at law, practicing in the State of Louisiana. I have an office in New Orleans. I live just
17 outside of the city of New Orleans, in the parish of Jefferson. I have resided in the parish of Jefferson about sixteen or eighteen years.

Q. Is the parish of Jefferson, where you reside, on the same side of the river as New Orleans?

A. New Orleans is on both sides of the river and so is the parish of Jefferson.

Q. Do you live in any town in the parish of Jefferson?

A. No, sir. It is not a town.

Q. Do you know the place called Westwego?

A. Yes, sir.

Q. Tell me what it was in 1894?

A. Westwego is in the parish of Jefferson opposite the city of New Orleans; that is, across the river. It is on the west bank of the river.

Q. How large a place is Westwego, or was it in November, 1894, and in 1894?

A. There is nothing there except houses that have been built around this railroad terminal. Before the railroad acquired this property, or built its wharves there, there was practically nothing there. Since that time a number of houses have been built and occupied principally by people who work there at the wharves. Before the wharf was built there was nothing there except the mud bank, the levee, which was on either side of the river and goes all the way up along the river to way up above the State of Arkansas. There is a steam ferry across from New Orleans to Westwego. I do not think that ferry was there prior to the building of the docks. To get across the river then you would have to go over in a skiff or a rowboat.

Q. What did the docks consist of in 1894? Give a general description, please.

A. It was a wooden structure built upon piles which were driven on the side of the river. There were two sheds on the wharf at that time. I am not able to state where, prior to the building of this dock, the Texas and Pacific Railway Company had its terminal. The
18 map you now show me approximately represents Westwego as it existed in November, 1894, as well as I am able to judge, as well as I can say that is a good representation of the situation there.

In 1894, at Westwego, there was no other dock, public or private, except the dock of the terminal of the Texas and Pacific Railway Company and this ferry that I speak of.

Cross-examination by Mr. TAGGART:

Q. You have known this wharf how long, Mr. Perkins?

A. I had been there before the wharf was built. I know just when the wharf was built. I think it was completed in 1893. I am telling you that from what I have learned; not from what I remember. I can only say that I remember it was about that time. Whether it was in 1892 or 1893, I am not sure. It was a large structure in 1894. Besides the wharf there is an elevator for the loading of grain and a connection from that elevator down to the water where ships can load.

Q. And it is, to your knowledge, a place of transfer, from the railway to the steamships, of cotton, is it not?

A. From the Texas and Pacific railway?

Q. Yes, and has been since it was built?

A. Ever since the dock was built.

Q. So far as you know, it is the only place of transfer of cotton for export to the vessels from the Texas and Pacific Railway Company?

A. I don't know that fact. I do not know, of my own knowledge, of any other place of transfer of cotton from the Texas and Pacific railway. I know of its being a place of transfer, but, of course, I know of the places in New Orleans where the Texas and Pacific delivers.

Q. Then there are other places where the Texas and Pacific has freight sheds and freight docks?

A. Yes, sir.

Q. But what is done there you don't know?

A. Not of my own knowledge.

19 ROBERT J. PERKINS, recalled as a witness for the plaintiffs, testified as follows:

Direct examination by Mr. CLEVELAND:

In November, 1894, I lived in the parish of Jefferson, above the city of New Orleans—on the other side of the river. I lived on the east bank. I am familiar with the district which now includes Westwego.

Q. In 1894 what was the nearest town or hamlet on the west bank of the river to Westwego—collection of houses or village?

A. There was a place called Amesville, about two miles below Westwego. That only consisted of one store, one grocery store, bar-room and two or three little houses. About three-quarters of a mile further down comes what is called Harvey. That has only two or three stores and some houses. But the nearest village is Gretna, which is the county-seat or parish seat of Jefferson parish, and that I should say was about three miles to three and a half below Westwego. That is on the river as well.

Q. In November, 1894, what police force existed in the district in which Westwego now is and then was?

A. The only police protection there at that time or now is the sheriff and his deputies, and the police elected by the police jury.

The police jury corresponds to the municipal board—county commissioners, I think you call them here. The office of this police jury was in Gretna.

Q. Do you know what was the number of the police force?

A. I think only four or five in the whole parish at that time. The parish had a frontage on the river on that side I should say of twelve miles, and on the other side of about eight or ten miles.

Q. Was there any fire-engine in 1894, engine for extinguishing fires at Westwego or near Westwego?

A. There was none at Westwego. The nearest was at
20 Gretna, from three to three and a half miles away. You asked about police at that point. I might say that the different police officers were distributed over the parish and there was one officer that covered a certain distance along the river front which included Westwego. His beat ran from Harvey's canal up to the upper line of the parish, about five and a half or six miles, I should say.

Cross-examination by Mr. TAGGART:

Q. These police officers lived in the house near the dock?

A. No, sir.

Q. Was not Mr. Gasenberg a member of this police force at that time?

A. No, sir. He was deputy sheriff, without pay. He had no duties, except what he chose to do. This police officer, I think a man named La Brun, at that time lived at Waggaman, at the upper end of the parish, about five miles away.

Q. You say there was no fire-engine nearer than Gretna?

A. Yes, sir.

Q. You mean an engine owned by the municipality, don't you?

A. No; I mean any sort of a fire-engine, that is, either volunteer or paid fire department. They have there only the volunteer department, in Gretna. There are no fire-engines, in the usual sense of the term, anywhere in the parish, except in those towns.

Q. You do not in your answer mean to say that there were no pumping engines there at the wharf?

A. Certainly not. I do not know anything about the capacity of the pumps that were there.

Q. You refer then to either a volunteer or other fire department of the parish?

A. I refer to the fire department, yes.

The WITNESS (referring to the map, Plaintiffs' Exhibit F): Westwego is at this point. Gretna is here. Amesville and Harvey are put on this map by names. There are very few houses there; only one store at Amesville and one or two at Harvey, and they have a name, and I spoke of them.

21 Q. Are they on the line of this railroad running down there on the west bank of the river?

A. Near the railroad, but there is no fire engine at all, that is, no fire department between Westwego and Gretna. The distance

from Gretna to Westwego is about three to three and a half miles I think I am about right in that.

By Mr. CLEVELAND:

Q. What is the distance back from the river front of the parish of Jefferson?

A. It goes 15 or 20 miles in some places.

By Mr. TAGGART:

Q. Back from the river?

A. Yes; at right angles with the river when the river runs north and south.

Q. And this officer that was on this corner of the parish, from Westwego up—how far back did his bailiwick extend?

A. He covered the whole parish. That part of the parish is very sparsely inhabited. It is only in the villages where we had officers at that time—and it is the same now—to any great number. This whole section up here back of Westwego and north of Westwego, and from Westwego down towards Gretna, is largely unpopulated. There is only one plantation between Westwego and Gretna. It is swampy about half a mile back.

Q. The method of access to Westwego is on the east bank of the river, is it not? You come up to a point opposite Westwego, and there a ferry leads across to a point near Westwego?

A. Yes: that is the way of getting at it from New Orleans. Of course from the Gretna side of the river there is a mud road up there—a mud road near the levee; that runs in back a little distance from the wharf, and on up, that is the only thing in the way of road or communication above Westwego.

Q. This point that is marked "company canal"—at the
22 terminus of that is where the ferry landing is, is it not, or very near there?

A. Just above there, yes. The ferry is nearly straight across the river at that point, from New Orleans, and this company canal is about a thousand feet from the wharf, or fifteen hundred. The map will show that. Somewhere around there.

Mr. TAGGART: About 2,000 feet?

Mr. CLEVELAND: Yes.

The WITNESS: This map shows the main line of the Texas and Pacific Railroad Company. I will mark on the map the end of the main line, that is, the north end. The Texas and Pacific Railroad Company approaches New Orleans from the west.

Q. Mark on this map, if you please, what purports to be the most westerly portion of the Texas and Pacific railroad.

A. I mark it "W."

From that point "W" the line runs in a westerly direction towards Texas, and, as shown on the map, in a southeasterly direction, down to a place called Gouldsboro. At Gouldsboro are the yards and shops of the Texas and Pacific, and at that place they have an incline. It is necessary in crossing the river at any point,

the Mississippi river, for a railroad to have a regular incline, so that the cars can get down and the transport boats can come up and the tracks can join. At New Orleans the incline is arranged so that the cars can run onto the transports. That was so in 1894. And in 1894 that was the way that the Texas and Pacific Railway Company got across to the city of New Orleans its railroad freight which it wished to take into New Orleans for any purpose. It does yet.

Q. In 1894, when the cars were run on these transportation boats, where did they go into New Orleans? Will you mark the points?

A. It goes right across the river there to the head of Thalia street.

Q. In 1894 did the New Orleans fire engines cross the river?

A. I don't know of any ever having crossed.

23 C. G. MILLER, called as a witness for the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

My occupation is freight agent of the Texas and Pacific Railway Company at New Orleans. I am the main freight agent; that is the title. There is a division freight agent and a local freight agent. I am the local freight agent, and was such in October and November, 1894. Prior to November 12, 1894, I had been such local freight agent in New Orleans about three years. I am thirty years old. My office was at the foot of Thalia street in the city of New Orleans. My duties as freight agent were generally in charge of the terminals at New Orleans and Westwego—the Texas and Pacific terminals and the warehouses and yards. The Texas and Pacific Railway Company had in or near New Orleans on November 12th, 1894, warehouses, yards, and other terminals as follows: The freight depot in New Orleans at the foot of Thalia street, in which my office was located, and the cotton shed and sky lot or cotton warehouse—a cotton warehouse known as the sky lot. That is also near the foot of Thalia street. Then we had the yards at Gouldsboro. That is across the river from our terminals in New Orleans. It is not in the city of New Orleans; it is in Gouldsboro, across the river from New Orleans. There are no warehouses over there. We have machine shops there—a round-house, yards containing switches, principally for storing freight but nothing for the storage of cotton. No cotton sheds or docks there.

Besides these warehouses and yards in New Orleans and the places I have described at Gouldsboro we had our terminals at Westwego. Westwego was not built at the time I became freight agent.

It was not built under my supervision, but during the time I was in New Orleans as freight agent.

24 Q. Now give me the names of the persons who were immediately under you, Mr. Miller?

A. At that time, at Westwego, Mr. A. L. Wilkinson was my chief clerk; and there were various employees there directly under Mr. Wilkinson and indirectly under myself. I can't recall the names of

all of them, but I will give you such as I can. Mr. N. G. Figures was chief clerk for Mr. Wilkinson. There was a Mr. Smith, cotton clerk; I don't remember his initials. Mr. Sykes was foreman, and Mr. Trainor—the gentleman here yesterday—was check clerk. There was a party by the name of Baker, also a check clerk. A man by the name of Valle Ruba, who was there, either a check or delivery clerk; a man by the name of Kelly, either a check or delivery clerk. There were the Boylan watchmen, one by the name of Peake, one named Robeau, and one named Schoen. There was a private watchman by the name of Schurb, either a private or Boylan watchman, but I think he was a private watchman. A private watchman by the name of Valle. Those are not all, but all that I can recall at this time at Westwego, aside from the laborers. I do not know the names of the laborers.

Q. Where did you perform your duties of local freight agent, at New Orleans or at Westwego?

A. Principally at New Orleans. New Orleans was the central location.

Q. How many bales of cotton were at Westwego when you were there a day or two before November 12th?

A. Likely to have the same number that were there when the wharf was burnt. About twenty thousand bales. I can't give it to you to the bale. It was not much in excess of twenty thousand, so far as that burnt on the wharf is concerned—probably a few hundred over. About twenty thousand on the wharf and about two thousand in cars are the approximate figures.

Q. When was the last delivery on board a ship at Westwego prior to November 12, 1894—of cotton, I mean?

25 A. I don't know as to the date of that; but during the week previous we delivered cotton.

Mr. CLEVELAND: We may state that November 12, 1894, was Monday.

Mr. TAGGART: Yes.

The WITNESS: I had something to do with employing the Boylan men. Very likely I saw Colonel Boylan at some time prior to November 12, 1894, in the month of November; I do not recollect; I do not recall any specific dates.

Q. Irrespective of the men that were furnished by Boylan's Detective agency, how many watchmen did the railroad company have at Westwego in November, 1894—day watchmen and night watchmen?

A. We had, regularly employed, one day watchman, a private watchman, not from the Boylan office, and one at night. The day watchman employed at the time of the fire was named Schurb. The name of the night watchman was Valle. Mr. Wilkinson was the main man in charge of the clerical force at Westwego. He had been in the employ of the company since along in the early spring of the year 1894, probably February. He was called chief clerk.

Q. Was there any person who was called a superintendent at Westwego?

A. There was a Mr. Roth, superintendent of the Westwego elevator, not of the wharf, however.

Q. I am speaking of the wharf.

A. No, sir; there was no superintendent of the wharf there.

Q. This person in charge there for the railway was this chief clerk, Mr. Wilkinson?

A. That is correct, so far as the party located permanently at Westwego is concerned.

Q. How soon after the fire was Mr. Wilkinson discharged by the company, if at all?

A. He was not discharged.

Q. When were his services dispensed with, if at all?

A. The fire occurred November 12th. It was probably in the latter part of November or early in December.

26 Q. What men familiar with the handling of cotton did the Texas and Pacific Railway Company have in its employ in November, 1894, whom it had in its employment during the previous season?

A. I don't know as to that. We probably had several.

Q. I want you to name one if you can, from memory; if you can't, please furnish me with it. I mean either as to the clerical force or as to general supervision.

A. I can name one man we had. On the outside—he was a sort of foreman; at one time he was chief discharging clerk at New Orleans, and his name was John Driscoll. He was employed in October and November, 1894. He was not at Westwego. He was employed at New Orleans, and is yet.

Q. I will have my question cover both offices—at New Orleans and Westwego—and ask you to state what men the road had in October and November, 1894, either at New Orleans or Westwego, who were familiar, as you understood it, with the handling of cotton, whom the road had had in its employment the previous season?

A. I don't recall that we had any men at Westwego that would come under that, except Mr. Sykes, who was in our employ the previous season.

Q. You have also, I presume, certain reports from Col. Boylan received by the railroad company during October and November, 1894?

A. Not that I know of. The reports furnished in the ordinary course of business we do not retain.

Q. What did you do with them?

A. Put them in the waste-basket as a rule. They were merely in the nature of incidental reports, and we don't make a practice of retaining any of those.

Q. You received a report from Mr. Boylan shortly after November 12, did you not?

A. In regard to the fire?

Q. Yes.

A. Yes, sir.

Q. Did you put that in the waste-basket?

A. No, sir; that was sent on to the auditor at Dallas.

27 Q. Have you a copy of it?

A. I don't know whether I have a copy or not.

Q. Suppose you try to look that up for us, Mr. Miller.

A. Yes, sir.

Q. Is Mr. Valle still in the employment of the company?

A. Yes, sir; I think he is.

Q. And has he been so continuously since November, 1894?

A. To the best of my recollection; yes, sir.

Q. In what capacity?

A. In various capacities.

Q. I wish you would refresh your recollection and see whether he has been continuously in the employ of the company since November, 1894.

A. I think he has; that is, to the best of my recollection.

Q. And in what capacity, I would like to know—I would like to see his account on your books.

A. Yes, sir. He was employed, to my certain knowledge, in the capacity of car-checker and watchman; I remember that distinctly.

Q. Continuously?

A. To the best of my recollection; I wouldn't say that positively; and he was employed for a while at Westwego also, if I remember rightly.

Q. When did you last, prior to November 12, 1894, Mr. Miller, attend a fire drill at Westwego?

A. I don't recollect having attended any.

Q. Never were present on such an occasion?

A. I don't remember it—no, sir.

Q. How many chemical fire engines did you have at Westwego?

A. None.

Q. When did you last, prior to November 12, 1894, have your test of hose at Westwego—I am asking you from your own knowledge, you know.

A. From my own knowledge I can't answer.

Q. You never were present at any test of hose?

A. Well, I was—yes, sir, but not at that time.

Q. Well, how long prior to November 12, 1894, were you there when the hose was tested?

A. Some considerable time; probably the time the hose was being put up there; near that time.

28 Q. When was that?

A. A year or two previous to the fire.

Q. You say two years?

A. Probably to be exact, it was about a year and a half.

Q. When was the dock at Westwego built?

A. It was completed in the early spring of 1893, as I recollect it.

Q. You mean the sheds were completed at that time—the whole structure?

A. The whole business.

Q. And was it then that you were present at the test of hose?

A. I think it was about that time. We did not have any armed force at Westwego at any time during October and November, 1894, except, perhaps, as Mr. Boylan's men may have been armed.

Q. What police protection did the town of Jefferson (the town of Gretna or the parish of Jefferson) furnish to Westwego, if any?

A. I am not familiar with that. I know we had one deputy sheriff furnished by—he was deputized by the parish officials, but was on our pay-rolls. One of our men at Westwego was a deputy sheriff, his name was Schurb, this man of whom I have been speaking.

Q. How far was the nearest fire-engine to your dock at Westwego?

A. I don't know as to that; probably at Gretna. I don't know whether they have any at Gretna. Gretna is about three or four miles from the docks at Westwego, I expect.

There were no policemen near Westwego, as I understand it; not that I know of.

Q. What is Westwego; describe it to me; simply this dock and elevator, is it not, and the ferry?

A. That is the most part of it; yes, sir. In October and November, 1894, I don't think there was but one house within a quarter of a mile of our dock. I can only recall one. There were some within half a mile. I should say probably half a dozen. One was a sort of country grocery store, as I recollect it; plantation store and houses for the accommodation of plantation hands.

29 Q. Perhaps, Mr. Miller, you have a document, or blue print, that you would be willing to produce, of the dock as it exists at present.

A. At present, no, sir, I haven't. I can say, though, it's pretty much the same at present as the old dock.

Q. With the saving exception of the fire apparatus?

A. The fire apparatus is differently arranged now than it was then.

Q. As it existed on November 12, 1894, there was one line of pipe running down the centre of the sheds, was there not?

A. Yes, sir.

Q. And that was all?

A. That was all as to the main line of pipe.

Q. How many hydrants, river or other were in the sheds in November, 1894?

A. There were three in each shed; and each was furnished with a coil of hose. That hose was one hundred feet long. There were six hydrants, or pipes, from which we could draw water on that whole dock in November, 1894. The dock was about eight hundred feet long, and the sheds, I should say, were probably—there were two sheds on the wharf, probably three hundred feet, or two hundred and fifty to three hundred feet would be the length of each shed. They consisted simply of posts and a roof. There were no sides to either one of them. In our parlance we designated the shed down

the river, downstream, at the end of the wharf, as No. 1, that was the one nearest the elevator, and the other as No. 2.

Q. How much space was there of dock or wharf between the upper end of No. 2 shed and the upper end of the wharf?

A. There was probably ten feet.

Q. And how much space was there between the lower end of No. 2 shed and the upper end of No. 1?

A. Probably 100 feet.

Q. I mean between the lower end of shed No. 2 and the upper end of shed No. 1?

A. Well, that would be about, say, a 100, 110 or 115 feet. Between those sheds was an open space which was not planked over.

The COURT: Does he mean no deck plank?

Mr. CLEVELAND: No deck plank; open to the water.

30 This whole structure, this wharf, was of wood. Wooden piles upon which beams or joists were laid, and then a flooring of wooden planks upon which wooden posts were erected which held the wooden roof. This open space between the two sheds was probably 50 or 60 feet in width—by width I mean between the two sheds, and it was entirely crosswise of the wharf; I don't know how long; it was not quite the width of the shed—yes, it just about was the width of the shed. The sheds, I suppose, were 300 feet wide, probably 250 to 300 feet. They were not exactly square. They were longer up and down the river than they were crosswise. I do not know how many posts there were in each shed. Or how far apart the posts were in each shed; probably fifteen feet apart; twenty feet you might make it.

There was one track between the front of the shed and the river. That track ran on the wharf.

Q. The whole length of the wharf?

A. Yes, sir; pretty much the entire length. Between the outer rail of that track and the river the space was probably thirty feet. And between the inner rail of that track and the line of the roof of the shed, probably eight or ten feet; there were two tracks in the rear of the sheds, or towards the land side. They ran the whole length of the dock. They did not run far beyond, but they ran some distance, probably 50 or 100 feet upstream. That was about the terminus of them.

Q. Now, how much wharf space was there, about, toward the elevator, from the end of number one shed?

A. Probably 50 feet from the end of the shed to the end of the wharf toward the elevator. These sheds are about 15 or 20 feet high say at the eaves of the shed. I could not give it any nearer than that.

Q. Did the roofs have a gradual slope, at first, and then when it reached nearer the middle of the shed, was a little more elevated, or was it one continuous sloping?

31 A. It was a slope until it neared the comb of the roof, and then there was a sort of cupola built up independent of the roof. The highest part of that cupola from the dock, the floor of

the dock, was probably thirty feet. The cupola was not open at the sides. I think it was lattice-work.

Q. Lattice-work on the sides?

A. I don't mean by that the cross lattice-work, but something like closed shutters, constructed in that way; window shutters; that cupola was part of the roof. It was really a portion of the roof—that is, it commenced where the roof left off, and then from the upright sides of the cupola, and then the roof of the cupola, together, constituted the roof of the shed. This cupola was probably ten feet wide; fifteen feet maybe. I should judge that the distance from the wharf to the place where the cupola began would be about twenty feet; the perpendicular sides of the cupola.

Now, between the side of the shed or the eave line of the roof of the sheds in the rear, and the edge of the wharf next to the tracks in the rear it was probably eight to ten feet.

Q. Mr. Miller, Col. Boylan has testified that the three watchmen that were on duty at Westwego in the night-time, from November 9 to November 12, 1894, inclusive, were E. Peake, P. A. Robeau and P. Schoen. Did you ever see either of those gentlemen prior to November 12th?

A. Yes, sir, likely I have. I have seen all of the force that there was employed at Westwego.

Q. At night-time? These are the night forces?

A. I was never up there at night. I likely saw them coming and going from there. I may have seen them coming and going. I don't know whether I did or not; I don't know them by name. I wouldn't be able to distinguish them from any others. I was aware, of course, of the labor troubles that existed about this time and some time previously, and I knew, of course, that it was a time of great excitement.

32 Q. How old was Mr. Valle, whom you employed as your watchman?

A. I don't know his age; I should judge though he was 23 or 24 probably. I don't know that his age in November, 1894, was 19. I never inquired; I don't know where he is now exactly; I know he is around the city somewhere. I think he is in the employ of the company now.

Q. How large was this pipe that ran through the centre of the sheds?

A. If I recollect right, it was about a six-inch pipe.

Q. Six inches?

A. Yes, sir.

Q. Isn't it the same pipe that runs there now?

A. I think so.

Q. You don't think that pipe is six inches, do you?

A. I haven't noticed it of late; I know it was a large-size pipe.

Q. What fed it; do you know anything about that—I am not asking you to guess, but I am asking of your knowledge?

A. No, sir; I don't.

Q. Who of your employees had charge of the fire apparatus on the dock?

A Mr. Wilkinson, the chief clerk, for one. He was the main man.

Q The Texas and Pacific road in 1894 was mainly a cotton road, was it not? Its main business was cotton?

A Cotton was probably the largest single commodity that it handled; yes, sir.

Q Have you obtained for me the particulars as to how many bales of cotton were unloaded at Westwego from the 1st of November?

A From the 1st? No, sir; I haven't got that yet; but I have the particulars as to what steamers we delivered cotton to during the week prior to the fire.

Q Please let me have that.

(Witness produces it.)

Q This is what you term a berthing report?

A A report made at the Westwego office to my office daily of vessels at the wharves up there, what class of freight they are taking, &c. The others that I have date from November 5th and cover each day up to and including November 11th. These berthing reports cover the hours of 7, 12 and 6 p. m. on each of the 33 days which they purport to give the particulars of.

Mr CLEVELAND: We will offer the berthing reports from the 5th of November to the 12th.

Marked Exhibit G (printed *post*, at pp. 260, *et seq.*).

The WITNESS: The first column indicates the grain wharf. Then there are two columns headed "1" and "2." They indicate the two cotton wharves—cotton wharf No. 1 and cotton wharf No. 2. Cotton wharf No. 1 was the wharf downstream, towards the elevator. No. 1 wharf, No. 1 shed.

Q There was no break in the line of the wharf, was there, along the river front? It was all one continuous wharf?

A The grain wharf, what we term the grain wharf, ran up and connected with the cotton wharf, the lower end of the cotton wharf. The cotton was all in one continuous wharf but divided arbitrarily by us into Nos. 1 and 2 in accordance with the sheds.

This report of November 5th shows that on November 5th there were loading at No. 1 cotton wharf the steamship Hageen, bound for Bremen, for account of the Elder-Dempster line, and at cotton wharf No. 2 the steamship Straits of Magellan. These figures, total, 2,994, concerning the Hageen, mean that up to and including the 5th of November we delivered to the steamship Hageen 2,994 bales of cotton and 1,908 bales of cotton to the S. S. Straits of Magellan. The report of the 6th shows the loading of them, so far as the cotton wharf is concerned. The report of the 7th shows that the Hageen finished loading at 11 a. m., and had taken up to date 4,729 bales. And the report of November 7th shows that the steamship Electrician, for Liverpool, on account of the Harrison Company, dropped down to No. 1 wharf at 12, noon. That report shows that the Electrician

and Straits of Magellan were loading at No. 1 and No. 2 wharf
34 in the latter part of the 7th day of November. The report for the 8th of November shows that the Straits of Magellan left at 9 a. m. on the 8th of November, having taken 2,997 bales, and that the Electrician was still loading on the 8th of November and that the steamship Malabar came to No. 1 wharf for cotton-seed cake at 1 p. m. on the 8th of November. The report of the 9th of November shows that the Malabar dropped back to the elevator at 2 p. m.—could not load—and that the Electrician was still loading, and left at 12:30 p. m., having taken then 2,413 bales. The report of the 10th of November shows the steamship Elberfeld arriving at No. 2 cotton dock and the Malabar loading at No. 1, the Elberfeld loading meal and cake—cotton-seed meal and cotton-seed cake.

The report of November 11th shows the Malabar moved to the elevator for a tug to make water and the Elberfeld was still loading cotton meal, and the Malabar returned at 6 p. m. for cotton-seed cake on account of Steinhardt & Company.

I haven't got the report of the 12th. I don't imagine it was made. I have no record of it. I judge on account of the fire that things got confused.

Q. Tell me the course of business which the Texas and Pacific Railway Company followed with the Elder-Dempster Steamship Company concerning the shipments of cotton from New Orleans which had been carried by the railroad from points in Texas and brought to New Orleans.

A. You refer now to New Orleans proper or Westwego?

Q. Did you make any distinction?

A. We made this distinction, that the cotton for New Orleans proper was drayed to the ship's side, and the cotton brought into New Orleans at Westwego was placed on the wharf from the cars.

Q. The railroad company in the first place made certain contracts, did they not, with ships or steamship companies?

A. Yes, sir; we made contracts, in New Orleans, with steamship agents for carrying before the cotton would arrive.

35 The Texas and Pacific Railway Company made the contracts for the season of 1894–1895. Very likely with every regular steamship agency here. There was the Harrison steamship line, which I know of, that we had contracts with, and the West India steamship line, Elder-Dempster & Company, Hammond & Company, the French line, or French Commercial line—that line changed its name within the last few years, and I am not sure which name it was going under then; the steamship line for which Miller, Meletta & Company were agents. The G. L. & S., or L. & H. lines were the other principal cotton lines, and there was the Hamburg-American Packet Company handled by the same agency. Those are about all the lines that I am certain we had contracts with. We should have the original contracts with these various lines that I have mentioned, namely, the Harrison line, the West India Company, the French line, Miller, Melatta & Co., G. L. & S. or L. & H., and the Hamburg-American Packet Company.

Q. In addition to these general contracts, this general contract

that you had with Elder-Dempster & Company, you also made from time to time, as the season progressed, did you not, special contracts with the same line—Elder-Dempster & Company?

A. We may have had other contracts with Elder-Dempster & Company besides this contract; oh, yes, we did have; we did have others besides contract No. 44. Those general contracts specified a rate of freight; all contracts did. Letters were not written to the Elder, Dempster Company for each special additional contract. The contracts were usually handled without any letters at all. In fact, it was customary to handle them by making them out in duplicate on a regular printed form, filled out in duplicate, one of which was signed by myself and given to Elder, Dempster & Company, or the steamship company, and the other signed by them, which was retained by myself.

Q. What was the next step toward the fulfillment of this general contract No. 44, or any one of the special contracts with Elder, Dempster & Company; I mean the next step taken by the railway company?

A. Well, the next step, I presume, would be to have the cotton shipped in Texas.

Plaintiffs' counsel reads contract No. 44, which is as follows:

"Original. Form 2370.

Texas & Pacific Railway Company.

NEW ORLEANS, LA., 9, 29, 1894.

Messrs. Elder, Dempster & Co., S. S. line:

I have this day engaged 20,000 bales of cotton for shipment by the Elder, Dempster & Company S. S. line for Liverpool, England, at 49-21 per hundred pounds, compressed cotton, delivery during months October, November, and December, 1894, as per conditions on the reverse side of this contract.

Contract No. 44.

ELDER, DEMPSTER & COMPANY,
By M. & R. WARRINER.

Yours respectfully,

C. G. MILLER,
Agent T. & P. Railway."

MR. CLEVELAND: There are no conditions printed on the back of this contract which are relevant to the controversy now at issue.

Q. What was the next thing that was done by the railway company?

A. Well, on arrival of the cotton here it was unloaded. And after the cotton arrived the Texas & Pacific Company would furnish Elder, Dempster & Company notice of arrival.

Q. What was the next step after you sent a transfer slip to the steamship company?

A. Then it remained for the steamship companies to take delivery of the cotton—send a steamer to Westwego and get it.

Q. Would you receive from the steamship company before the steamer arrived at the dock any paper?

37 A. Yes, sir; ordinarily we would receive—usually the transfers would be returned to us, either endorsed on the face of the transfer by the steamship agents to deliver the cotton to a certain steamer, or a letter of transmittal returning the transfers. Either practice was in effect.

Q. The practice was for the steamship company to return you your transfer slips which you had sent to them with certain particulars filled in by the steamship company, indicating what lots of cotton the steamship company was ready to take delivery of? Is that the fact?

A. Yes, sir; ordinarily that was the case.

Q. Then what was the next step?

A. The next step was for the steamer to go to Westwego and take charge of the cotton. Upon the arrival of the vessel at the dock the employees of the railway company at Westwego would, in company with some one of the ship's employees—the mate, probably—go around and count the various lots of cotton that were there, and the mate would give us what is termed a "mate's receipt" for that cotton before loading it on the vessel.

Q. And at or shortly prior to the arrival of the steamship the cotton designed for that steamship would be brought out on the dock by the railway employees, would it not?

A. Not necessarily. That would depend upon where the cotton was, and in a number of instances the mate of the steamer would receipt to us for it, and the steamship laborers would truck the cotton from where we had it on the dock to the vessel.

Q. What period of time usually elapsed between the receipt by the railway company of the transfer slips from the steamship company and the arrival of the steamer at the dock at Westwego?

A. Well, that would all depend—at times the transfer slips were returned to us before the steamer would arrive. At other times the steamer would be in the river at some city wharf expecting to go to Westwego the next day or several days after. At other

38 times the slips were probably returned the same day the steamer went to Westwego.

Q. What was the object of the steamship company returning to you the transfer slips?

A. Well, to designate the quantity of cotton they might want aboard a steamer and what particular cotton—at times.

I don't know how many chemical fire buckets there were at Westwego on November 12, 1894. I know that we had chemical fire buckets there, but I don't know as to the number.

Q. What is a chemical fire bucket?

A. It's a structure in the shape of a pail, closed as to the sides and bottom, encased in a tin or zinc case with a handle to it like an ordinary pail or bucket—some such style as that. The top of the bucket was covered with tin foil, that is, after the chemical liquid was placed in it. That was covered over by a row of tin foil, and then there was a sort of top to fit over that head of the same mate-

rial as the tin or zinc case; that cap set loosely over the tin foil so that it would be readily moved and the contents used. On November 12, 1894, there were some of those buckets on the dock at Westwego. I do not know how many. I have seen some there numbers of times. About every time that I was up there. The railway company bought them from a man by the name of Edwards, who was the agent here. They were bought probably two and a half years prior to the fire, or in 1893, possibly, or it may have been in 1892. It would be next to impossible for me to look up the memoranda of the purchase, for this reason, that I did not make the purchase direct; the purchase was likely made through our purchasing department or the general manager's office. All I know is that Mr. Edwards, the agent for these buckets, if I recollect right, brought the buckets up, and I met him several times since that, and he has had some conversation with me as regards the buckets.

Q. The documents which you showed me the other day
39 and which you call berthing reports show that there was room, as I understood them, for two vessels to load at the cotton docks. Is that right?

A. Yes, sir; two vessels with key berths; what we term inside or key berths.

After our receipt from the steamship company of these transfer slips with marks of lots of cotton upon them, if it should be necessary to get out the cotton that was mentioned on them, that would be attended to by some of the employees at Westwego—the railway employees at Westwego, as to locating the cotton and getting it out. It was not necessary to get it out at all times.

Q. Where was it?

A. On the wharf.

Q. What part of the wharf?

A. It was all over the wharf.

Q. Inside or outside of the railway tracks?

A. Usually stored, and inside of the railway track toward the land. I don't know that I issued any specific orders in respect to getting out that cotton to any one. It was understood that we would get out cotton when necessary to do it. By getting out cotton I mean trucking it from where it was originally stored on the wharf, out say in front or near enough in front to enable the steamship people to get it out without having to go around other piles of the cotton. When it was done at all, it was usually done after the receipt of these transfer slips from the steamship company.

Q. Was it usually done?

A. That would depend on the location of the cotton on the wharf. In some instances it was done and in some instances it was not done. I do not mean necessarily that before the receipt of the transfer slips from the steamship company the cotton that was destined for a steamer was put between the sheds and the river. I simply mean that if cotton which Elder, Dempster & Company, for instance, sent a steamer there to get; if it was where they could get at that cotton, if there was no obstruction of any consequence between where this

cotton was stored that they went there to get and the ship's
40 side, that in that case we had nothing to do with getting it out; they took it from where it was located.

Q. How much of your time did you spend at Westwego?

A. I can't say as to that.

Q. On the average an hour a day?

A. No, sir; not throughout the season. Sometimes it would happen that I was not there for a week; not at that period, however. Taking the twenty days prior to November 12, 1894, I was probably at Westwego six or seven times, maybe oftener. During those six or seven times, I can't say what was the average duration of my visits, it may have ranged anywhere from half an hour or an hour up to three or four hours.

Q. Do you recollect at any time spending three or four hours at Westwego in the three weeks prior to November 12, 1894?

A. No, sir; not specifically. I was at that time a very busy man, that was at the height of our cotton season. And during that cotton season a very large crop had been produced, and the railway company was receiving a very large number of bales of cotton.

Q. Have you figured up for me, Mr. Miller, how many bales of cotton were unloaded from cars at Westwego between the first day of September and the 12th of November, 1894?

A. No, sir. The request as to that was made from the 1st to the 12th of November, and I have that here.

Q. State to me how many between the 1st and the 12th of November.

A. I give it to you as to dates, and state that I am now refreshing my recollection and referring to the reports I have before me.

Mr. CLEVELAND: We offer these reports in evidence.

Marked Exhibit H (printed *post*, at pp. 267 *et seq.*).

These are tissue copies of daily reports made to myself by the Westwego office. On November 1, 1894, we unloaded on the
41 wharf 1,692 bales of cotton. The report which I now produce, and which runs from November 1st to the 12th of November inclusive, gives all the information which I received at that time on the subject. Our daily report of the 12th of November, 1894, which you show me, shows that there were on that date on hand in cars at last report 145 cars carrying 5,245 bales; and that there were received on November 12th, 65 cars with 2,760 bales in them. So that there were on hand at the close of the day's business, apparently, from that, 210 cars. That there were none unloaded on the 12th, and that there were on hand that night 206 cars with 8,000 bales in them, and that there were on the dock that night 20,879 bales, and that there were none loaded on a steamship that day. That the total receipts "this season" were 64,316 bales, and the total delivered on steamships 34,764 bales.

Q. What does this mean at the end of these daily reports concerning insurance reports?

A. That has reference to the number of bales on hand consigned via each particular line. It is called an insurance report for the

reason that we telegraph our auditor in Dallas, Texas, each day as to the number of bales of cotton on hand. I don't know for what purpose. I have never heard. I presume it had some connection with the matter of insurance; I don't know.

Q. Will you show me the report that you sent on November 12 to your auditor at Dallas, Texas—your letter-press copy of it?

A. Those reports are sent from the Westwego office. I don't know whether I have a letter-press copy of it or not. I have our letter-press copy book here that we kept at Westwego. That report being a telegraph report, I do not know that it would be copied in my office record book. That would not ordinarily be kept here, I should not imagine; that was in the nature of a telegram, and the telegraph office was located up in the elevator office. I expect, however, that this is it.

I produce letter book, which will be marked for identification Plaintiffs' Exhibit 49, and refer to page 310 which reads:

42 "C. G. Miller, New Orleans, La., Westwego office, 11, 12, '94, R. Fenby, Dallas. On wharf tonight 250 bales local cotton; 21,448 bales through cotton; 125 sacks c/s cake;" and those are my initials, signed by Mr. Figures. That is a sample of the telegrams that were sent daily by the Westwego office to Mr. Fenby at Dallas, so that he knew exactly what cotton we had on hand every day.

Q. Letter-press impression of the daily report of the 10th November "Plaintiffs' Exhibit No. 47" being rather indistinct I will ask you to interpret it, so that the stenographer can take it down?

A. It was designated as a cotton report. "On hand in cars last report 114 cars, 4164 B/C. Received today 18 cars 589 B/C. Unloaded today 8 cars 274 B/C. On hand tonight 124 cars 4479 B/C. Delivered to steamship today none. Total receipts this season 60,765 bales. Total receipts last season 45,033 bales. Total increase this season 15,732. Total delivered steamships this season 34,764. Forwarded to New Orleans 668 bales." "Insurance report, steamship 9, destination on the cars." Immediately after the words "on the cars" it is indistinct, but it looks more like 125 cars than anything else. The numbers under the heading "Insurance reports" are so blurred that I cannot read them. The names of the steamship lines are in the same order as the report of November 12. The destination in the same order as on November 12th; and under the heading "on cars" opposite "Havre" 4081; opposite "Liverpool" 314 bales; opposite Harrison line, Liverpool, nothing; opposite "E. D. Line, Bremen," 84 bales, and local 250.

This report of November 12, 1894, states that we unloaded no cars on that day. I know nothing to the contrary of that; and that we only unloaded eight cars of cotton on November 10th which was Saturday. I know nothing to the contrary of that. The number of bales delivered to each steamer from November 1st up to the 12th appears on the second sheet of these daily reports that I have produced.

43 You wished to know what force we had employed at Westwego in November, 1894, that we had previously had in our

service exclusive of the laborers. I have had the pay-rolls examined and I have them here also with the following report. Sykes, who was foreman at Westwego in November, 1894, was previously employed by the company during previous seasons. J. A. Coffey was also previously employed, that is, employed in previous seasons prior to the season of 1894–'95. Those are all the names that appear on the rolls—on the Westwego rolls—as parties who were employed at Westwego, in all except the capacity of laborers, that had been employed by the company in previous seasons, with the exception of Mr. Wilkinson, whose employment dated from the early portion of 1894. He was first employed about the month of February, and he remained in the employment of the company after the fire; up to about the early part of December. He was employed by the month.

Q. Then since November he was dismissed, was he not?

A. No, sir, he was not employed by the month—I mean he was paid at the rate of so much per month. There was no obligation, however, as to his remaining in the service any full month; he was not dismissed. He was dismissed, discharged or let go early in December, perhaps; probably the first week in December. I don't know how near the first. I can refer to the books. It is my understanding that he has since been in the employment of the company in Texas. I know of his being, I think it was, at Clarksville, Texas, also at Paris. I don't know when he was re-employed. The railway company did not own any steam-tugs, to my knowledge; they did not have any boats at all at Westwego of any kind. I do not recollect how the planks which composed the floor of the wharf, as it existed prior to the fire, were laid; I do not remember whether they were laid crosswise or lengthwise.

44 Q. Were they laid close together, I mean, or were there cracks between them?

A. Well, there may have been. It was the intention to put them close together, and they were put that way.

Q. Laid in juxtaposition, you mean?

A. Closed up like——

Q. Like the floor of a house?

A. No, not like the floor of a house—not tongue and groove—but the ends of the planks were squared off. This cotton which we received at Westwego and which was destroyed by fire was all compressed cotton.

In the case of Louis Auguste Marande *versus* The Texas and Pacific Railway Company I have and produce the following waybills: Nos. T. 70, T. 71, from Greenville, Tex., to New Orleans, dated October 31, 1894.

Plaintiffs' counsel offers in evidence waybill T–70, stamped across the face "Set out at Westwego."

Marked Exhibit K (printed *post* at p. 279).

Plaintiffs' counsel offers in evidence waybill T–71, stamped across the face "Set out at Westwego."

Marked Exhibit L (printed *post* at p. 280).

Mr. CLEVELAND (to Mr. Taggart): Will you state the dates of arrival?

Mr. TAGGART: The two cars covered by those waybills arrived in Westwego the 7th of November, 1894. There were 36 bales in one car, that is under waybill 70, and under waybill 71 there were 29 bales in the other car. Both cars arrived on the 7th of November.

The COURT: They now concede that it was November 7, 1894. Mr. Taggart has conceded that it arrived November 7, 1894.

By Mr. TAGGART: On November 12th the cotton was in the cars and not unloaded.

The COURT: Thirty-six bales in one and twenty-nine in the other at the time of the fire.

45 It is stipulated by counsel that the course of business between the steamship lines and the defendant was as follows: This wharf was at the terminus of a branch of the defendant's line of railway on the bank of the Mississippi river, and was built out over the river far enough so that cars could be run upon the tracks in the rear of the wharf and unloaded and vessels come to the front of the wharf and receive the freight thus unloaded. It was controlled exclusively by the defendant, and used by it for the temporary storage of freight of all kinds brought over its railway and awaiting delivery to the consignees or for transportation by vessels. Upon the shipment of the cotton in Texas bills of lading would be issued to the shipper. Thereupon the cotton would be loaded in cars of the defendants and a waybill giving the number and initial of the car, the number and date of the bill of lading, the date of the shipment, the names of consignor and consignee, the number of bales forwarded on that particular waybill, the marks on the cotton, the weight, &c., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the waybill and car at Westwego a skeleton would be made out by the defendant's clerks at Westwego, for the purpose of unloading the car properly, containing the essential items of information covered by the waybill and the date of the making of the skeleton. When this skeleton had been made out and the car had been sidetracked at the rear of the wharf, the skeleton would be taken by the defendant's check clerk, and he would proceed with a gang of laborers to open the car. The cotton would then be taken from the car, examined to see that the marks corresponded with the items upon the skeleton, and deposited in one of the sheds upon the wharf designated by the check clerk, and the check clerk would mark upon the skeleton the location of the cotton. The sheds were

46 subdivided into fifteen sections, and the location of the cotton was left to the check clerk. The skeleton would then be transmitted to the general office of the defendant, and the defendant would make out a "transfer sheet," containing substantially the information contained in the waybill, and transmit the transfer sheet to the steamship line. The steamship lines upon receiving the "transfer sheet" understood that cotton for their vessels was on the wharf at Westwego, and would collate the transfers relating to such cotton as was destined by them for a particular vessel, return

the transfer sheet to the defendant, and advise defendant what vessel would take the cotton. Thereafter the steamship company when it was ready to take the cotton would send the vessel with their stevedores to the wharf, the defendant's clerk would go with the master of the vessel and identify and count out the particular lots of cotton designated for his vessel, the master would O K them, and the stevedores would thereupon take the cotton and put it on board the ship. Before the cotton left the wharf the defendant would obtain a receipt for it from the master of the ship.

Mr. CLEVELAND (to Mr. Taggart): It is stipulated in this case that the cotton was never taken out of these cars; that it reached Westwego on November 7th, and, therefore, that no transfer sheets respecting the cotton in suit, and no notice of its arrival at Westwego, were ever sent to the steamship company? That is right?

Mr. TAGGART: Yes.

Plaintiffs' counsel continues reading from the deposition of Mr. Miller.

Q. Where is Elder-Dempster Company's wharf, or where was it in November and October, 1894?

A. One wharf they were using was the Westwego wharf, belonging to our company. They were using another wharf in New Orleans.

Q. Where was the Elder-Dempster Company's wharf, was my question, Mr. Miller, if you know?

47 A. They were using two wharves; they did not own any wharf, as I know of.

Q. Where was the wharf that they used?

A. They were using a wharf on the city's front, immediately above Jackson street, as I recollect. That is in the city of New Orleans. I think it was generally known as Elder, Dempster & Company's wharf.

Q. Mr. Miller, you recollect receiving from Colonel Boylan, or one of his officers—either the major or the lieutenant of the agency—reports concerning a fire that took place on your dock on October 23d?

A. Yes, sir; I remember I did receive reports.

Q. But that report I am speaking of, concerning that fire on October 23d, I think it was?

A. I don't remember that specific instance.

Q. You recollect my reading a report, here, in evidence, from Colonel Boylan's agency to you concerning a fire on October 23d, do you not?

A. I remember in regard to a small fire, but I am not sure as to the date, "October 23d"—but previous to the fire of November 12th—I remember that. I also remember receiving Colonel Boylan's report as to Mr. Wilkinson's firing a shot at a dog on the dock. That was before the fire, also.

Defendant's counsel reads from the deposition of Mr. Miller, as follows:

Cross-examination by Mr. TAGGART:

Q. You were inquired of respecting Elder-Dempster & Company's wharf in the city of New Orleans. Was it the custom of the Texas and Pacific Railway Company to ever deliver cotton to Elder-Dempster & Co. at that wharf?

A. At times.

Q. That is, what kind of cotton, or nature, or sort of shipments, were delivered to Elder Dempster & Co. in New Orleans?

A. Practically the same class of cotton as that we were handling at Westwego; but it was not the custom to make deliveries at that wharf of Elder-Dempster & Company in the city at that
48 time. At that time we were handling their business at Westwego.

Q. And for how long a time had you been handling it at Westwego?

A. Probably for a month or a month and a half previous to the fire, as to that particular season of 1894–'95. It had been so handled the previous season at Westwego.

Q. Was there any other recognized place of connection between Elder Dempster & Co.'s line of steamships and the Texas and Pacific Railway Company than Westwego at and prior to the time of the fire?

A. No, sir.

S. V. FORNARIS, called as a witness on behalf of the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I live in New Orleans. I am president of the Union national bank and steamship agent for the French line. The name of my firm is S. V. Fornaris & Co. The firm of S. V. Fornaris & Co., steamship agents, has been in existence about eighteen years here in New Orleans. And I have been a member of the firm all that time. I was in that business in 1893 and 1894. I have always represented that line since I came here. At first it was the Commerciale line.

We have particular terminals here, wharves or docks, for our line. They are at the foot of St. Andrew and St. Mary streets. They were there in 1894; it was there since 1884 or 1885; I don't know exactly. We have no other dock here besides that.

Q. What business, Mr. Fornaris, was that line engaged in in 1894?

A. Carrying freight from New Orleans to Havre, specially.

Q. What kind of freight?

A. Cotton, oil cake and the products of cotton, lumber, grain and general freight.

49 Q. Did your line, in 1894, receive freight or cotton at any other docks than your own?

A. Yes, sir; we went to take freight from other docks. I am familiar with the customs and usages existing in this port, as to

the shipment of cotton to various ports in Europe, and I was familiar with such usage and custom in 1894.

Q. I believe you stated you had some vessel loads at Westwego?

A. Yes sir.

Q. Under what conditions, if any, Mr. Fornaris, did your vessels go to Westwego?

A. Whenever there was a sufficient quantity of freight to justify my sending a vessel over there.

Q. Well, what quantity of cotton in 1894 justified your sending a vessel over there?

A. Nothing less than 1,000 bales. If the Texas and Pacific had less than 1,000 bales to ship on our line in 1894, delivery would have been made to us at our wharf on the New Orleans side of the river.

Q. Do you mean, Mr. Fornaris, that in 1893–1894, you would not send a vessel to Westwego for less than 1,000 bales of cotton?

A. Yes, sir.

Defendant's counsel reads from the cross-examination of Mr. Fornaris as follows:

Cross-examination by Mr. TAGGART:

Q. Mr. Fornaris, did you have any bookings of export cotton with the Texas and Pacific railroad, which is involved in the Westwego fire suit?

A. I don't know that I have any. I had some bookings for the Texas and Pacific outstanding at the time of the fire. I had some cotton booked, that was burned on the other side. But whether it was cotton involved in New York suits, I don't know, because I don't know which is the cotton involved in that suit.

This booking of cotton was export cotton for Havre, which, I suppose, the railroad company went into Texas and engaged from the shipper, based on our ocean rate and the rail rate from there
50 to New Orleans. That's the way business was done, I suppose. And I received that at Westwego.

Q. Under those bookings that was the understanding, was it not, after the wharf at Westwego was built?

A. Yes, sir; whenever we went to Westwego to take cotton—spot cotton—but I cannot remember positively about this, because I thought the steamship was in New Orleans, on the New Orleans side, and the cotton was to be delivered at my wharf in New Orleans, and yet it was burned on the other side.

Q. You don't know whether that cotton was involved in these suits in New York?

A. I know it was cotton destined to the Canaries, to be delivered on the New Orleans side of the river, and the cotton was burned at Westwego. That was a special arrangement as to point of delivery, and the point of delivery was at my wharf. I don't know who it was who shipped the cotton; I could — by referring to my office. I don't know the consignee, but I can — by referring to my books.

Q. Do you know the amount of cotton?

A. A few bales; not many. I don't know whether that was the entire amount of booking I had with the Texas and Pacific at the time of the fire. I can't recollect. I don't know whether there was any more cotton for my ship or not.

Our line was accustomed to go to Westwego as well as to other wharves where freight was to be delivered—where we could get freight—whenever there was a sufficient quantity to justify our going there. Under a previous arrangement with the Texas and Pacific, we made an engagement with them that if they had so many bales we would go there to take them. But we only made these arrangements to go there under those circumstances, and if there was not enough to justify me I would not send a ship there. I would not send a ship anywhere for ten bales of cotton. There had to be a sufficient amount of cotton to justify me in sending for it.

51 That was true at Westwego, Southport, on this side, Algiers, or anywhere.

In respect to this cotton I speak of being delivered, it was a small amount of cotton, maybe 15 or 20 bales. I think it was on an export bill of lading, on a through bill of lading, destined to the point of destination, which was the Canaries, and the steamer signed under a through bill of lading; that is my recollection.

ALEXANDER HARRIS, called as a witness for the plaintiff, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I was born in 1843; am 56 years of age, and have lived in New Orleans since I was four years old; my residence is at the corner of Esplanade and Bourbon, and I was since 1885 a partner of Mr. Moulton, and since 1895 I have been the agent of the Cromwell Steamship Company. Prior to 1895 I was still in the same business, steamship agent. I am not familiar with Westwego; I never went over there. I never heard of a vessel discharging or receiving freight at Westwego prior to the erection of the dock of the Texas and Pacific Railway Company. There was no commercial business done there prior to the erection of these docks.

I am familiar with the port of New Orleans.

Q. Prior to the erection of this dock, did you consider Westwego as being, commercially, in the port of New Orleans?

Objected to as calling for an opinion simply. Objection sustained. Exception by plaintiffs.

Q. In November, 1894, did you consider Westwego as being commercially within the port of New Orleans?

A. I tell you that from my own knowledge I cannot answer it, because I paid but very little attention to it.

52 Q. If your line brought any freight here consigned to New Orleans, Mr. Harris, would you, in 1894, consider that you could have delivered it at Westwego, and that that would have been a delivery such as was contemplated under that bill of lading?

A. No, sir. Our line of vessels handles cotton from New Orleans. Our wharf in New Orleans is at the foot of St. Louis street. We handled cotton in 1894. We have received thousands of bales of cotton over the Texas and Pacific railway. Delivery at that time was made right at the switch at our landing. We received cotton in 1894, from the Texas and Pacific Railway Company. And it was delivered then at the same place in the cars, and we discharged the cars. That is at our wharf.

Q. How long subsequent to the erection of those docks did ships first begin to go there for cotton?

A. Well, really, I will tell you frankly, that I cannot exactly answer. I only know that after the erection of the docks, why there was a pretty good traffic done over there, and as to dates I can't tell you anything about it.

Defendant's counsel reads from the deposition, as follows:

Cross-examination by Mr. TAGGART:

The Cromwell line of steamers, of which I was the agent in 1894, runs regularly from New Orleans to New York; New York is the other terminus of the line.

Q. And the cotton that you carried is cotton for New York, is it?

A. No; cotton destined for any place; for instance, Europe, or generally the eastern mills.

Q. Now, does that cotton come here on local bills of lading over the Texas and Pacific Railway Company?

A. Under through bills.

Q. Under an arrangement for a division of the through rates?

53 A. Well, it is a prorate, the steamship getting its division of the rate. That is, it is a through rate from the point of shipment to the New England mills.

Q. It does not come on a booking, such as is made for cotton to Liverpool, nothing of that sort?

A. No, sir.

Q. It is on a mere percentage of the through rate between the different railroads?

A. Exactly, and not as to quantity. And the Texas and Pacific Railway Company takes its proportion of that through rate, and the Cromwell line will take its proportion. That comes in car-load lots to New Orleans, and is delivered to our line.

Q. Your line happens to be near a switch of the Texas and Pacific Railway Co.?

A. The switch is more of a Louisville and Nashville Railroad switch, and the Texas and Pacific make delivery in there, and it comes down over that switch direct to us, the Louisville and Nashville making such switching down to our dock.

Q. The Louisville and Nashville gets a certain switching charge out of this through rate?

A. They get so much a car. And the switch charge, whatever the through rate may be, is based upon the number of cars handled.

It is an arbitrary switching charge. That switch brings the car down to our dock. And delivery is made there, so far as our line is concerned. Our line did not, either in the case of the Texas and Pacific or the other railway companies, go to their docks to get the cotton. In the case of all the other cotton delivered from other railways, it was through a switching arrangement similar to this and brought to our wharf, or by floats or by drays.

Q. So that you know nothing about foreign export cotton and like things handled in New Orleans, and you handle none of that except as it may happen to come to New Orleans and be reshipped over your line?

A. That is all.

54 JOHN G. WOODS, called as a witness for the plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

My name is John G. Woods. My business in New Orleans has been that of commission merchant for the past ten or eleven years, engaged exclusively in the Central American fruit trade.

Q. Has the company with which you have been connected ever been the agent of any line of steamships or handled or chartered any steamships?

A. Have been handling steamers constantly in the Central American trade. I am familiar with the importing business in New Orleans from Central America.

Q. Have you been to Westwego where the docks of the Texas and Pacific Railway Company are?

A. Personally, I have never been at Westwego.

Q. As a merchant connected with the importing business here, would you say that, in 1894, Westwego was considered, commercially speaking, within the port of New Orleans, within the port of entry of New Orleans?

A. No; I would not.

Our company handles fruit very largely, and that fruit comes consigned to New Orleans.

Q. Could a delivery of that fruit in your estimation made in 1894, at Westwego, have been such a delivery as was contemplated under that bill of lading?

A. No. I should say it would have to be brought to the New Orleans side of the river.

Q. Would you have received a delivery made there without a protest?

A. By no means.

Defendant's counsel reads the cross-examination of this witness as follows:

Cross-examination by Mr. TAGGART:

Q. Mr. Woods, you are considering this question from the standpoint of your particular business, the fruit business, are you, and

the receipt and delivery of fruit? You don't know anything
55 about the business at Westwego in respect to other lines for importation and exportation, do you?

A. No, sir, I am entirely unfamiliar with Westwego.

Q. You say that in the delivery of fruit consigned to you to the port of New Orleans, you consider that to be on the New Orleans side of the river?

A. That is the idea.

Q. An attempt to deliver at Algiers, which is right across the river, would be equally objectionable, in your opinion, wouldn't it, so far as your business is concerned?

A. So far as my business is concerned, it would have necessarily to be delivered on the New Orleans side of the river.

Q. Algiers is a part and was a part at that time of the port of New Orleans, according to the act of Congress, that is in 1894, was it not?

A. That I am not sure of, but in either case I would not consider a delivery on the other side of the river of goods consigned to me at the port of New Orleans as a delivery at the port of New Orleans. Regardless of whether it was within the limits fixed by the act of Congress or not. I am not considering that feature of it at all.

Q. You are considering it solely from the standpoint of your line of business and not from that of any other business?

A. I would consider it, if it comes to a question of discussion, I would consider it objectionable and not a delivery at New Orleans, if goods were delivered on the other side of the river.

Q. In any line of business?

A. In any line of business.

Q. But particularly you are viewing it from the experience you have had in your business as a fruit merchant?

A. That goes without saying.

By Mr. CLEVELAND:

Q. Would you say you were familiar in 1894, with the custom in vogue here for the delivery of goods consigned to New Orleans?

56 A. Well, no, sir; I couldn't say that I am; the delivery of general goods and the consignment of these goods is a matter entirely out of my line of business and I pay but little attention to it; have given little thought to it.

By Mr. TAGGART:

Q. How would it be in the case of a consignment of fruit to New Orleans and, thence, by the Southern Pacific to Houston, Texas, for instance, a through shipment on a through bill of lading, would you consider that it made any difference whether the goods were delivered from the ship to the Southern Pacific Company on the New Orleans side of the river or on the Algiers side of the river?

A. As far as transportation is concerned, it would make no difference, it would be then a mere matter of detail, handling and expense, and the grade of the goods, and it would be preferable on the

New Orleans side of the river; but in this fruit business, that is entirely beyond the pale of possibility; the fruit business could not be done in that way. It is a peculiar line of business, and must be handled in cars all at once, because it is a perishable article, and has to be handled carefully and skillfully. I say that none of our business is changed at all; it is all delivered on the New Orleans side of the river, and the cars are switched over the various lines of railroad for which they may be intended, and the loading is done at the Northeastern fruit wharf, and at the Illinois Central fruit wharf at the foot of Thalia street. I am speaking now of the fruit business with which I am acquainted. Of the other lines of business I am completely ignorant, except in a general business way.

57 L. C. FALLON, called as a witness for plaintiffs, testifies as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am sixty years old; a coffee and commission merchant, and my residence is in New Orleans. I have been engaged in that business about thirty-eight years. I am not very familiar with Westwego.

Q. You are an importer of coffee, Mr. Fallon?

A. Yes, sir; I import some coffee; that is not the principal business I do in coffee, though; I am importing for myself and for others.

I say I am not very familiar with Westwego. I have been to Westwego a few times.

I do not remember when the dock of the Texas and Pacific Railway Company, which was burned in 1894, was built.

Q. Did you ever know of vessels to discharge or receive freight at Westwego?

A. Yes, receiving freight; I never had anything to do with the discharging of freight.

Q. When first did you know of a vessel receiving freight there?

A. For myself I have shipped cross-ties—bought cross-ties up the railroad, and had them brought and delivered at Westwego by contract.

Q. Do you know whether or not any commercial business ever was done at Westwego prior to the erection of this wharf?

A. No, sir.

Q. You are familiar with the port of New Orleans, Mr. Fallon?

A. Yes, sir.

Q. Prior to 1893, did you consider Westwego as being commercially within the port of New Orleans?

Objected to as calling for an opinion. Objection sustained. Exception by plaintiffs.

Q. In November, 1894, did you consider Westwego as being commercially within the port of New Orleans?

58 A. Well, really, I don't know whether Westwego is a part of the port of New Orleans today. I never would accept

delivery of a cargo of coffee there. If a shipper of coffee was to send me a cargo of coffee for delivery at New Orleans, and it was delivered at Westwego, I wouldn't consider it brought to the port of New Orleans. I never knew of the delivery of any goods consigned to the port of New Orleans, at Westwego.

Q. When, first, to your knowledge, was any commercial business done there?

A. I don't know of any business but my own. I have had nothing to do with Westwego.

GEORGE R. WESTFELDT, called as a witness for plaintiff, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am forty-eight years of age, reside in New Orleans, and am a coffee merchant; I am familiar with the port of New Orleans for coffee purposes.

Q. In 1894, did you consider Westwego as commercially within the port of New Orleans?

A. Not for coffee purposes.

MATTHEW WARRINER, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

Q. Mr. Warriner, what is your occupation?

A. Representing the Elder-Dempster Company—steamship agents. I have been representing the Elder-Dempster steamship lines at New Orleans since 1892.

Q. Where, in 1892, was the dock of the Elder-Dempster Steamship Company in New Orleans?

59 A. We were allotted a wharf at Jackson street, and we retained that wharf during the season of 1892–'93, and 1894–'95, and up to the present time.

Q. Did you have any other dock in the port of New Orleans?

A. We have loaded vessels at other docks.

Q. But you have had no other leased or special dock?

A. No, no other special dock. This is a grant from the city; that's a special privilege—grant. It isn't our dock, but a special privilege to land there; it is known in New Orleans as the Elder-Dempster Company's dock.

Q. During the season of 1893–'94, the season before the fire at Westwego, did you receive cotton from the Texas and Pacific Railway Company—at that time?

A. I think we did. I couldn't tell how much it formed, only very approximately, but it would run into the thousands, I should think.

Q. Did you receive any at that time from the Texas and Pacific Railway Company—during the season of 1894–'95, do you recollect?

A. Yes, sir; a considerable quantity.

Q. And how was that cotton delivered to the Elder-Dempster Co.'s line, at New Orleans, in the season of 1893–'94?

A. By dray.

Q. And the same during 1894–'95?

A. By drays and barges. We, also, during the season of 1894–1895, sent some of our steamers to Westwego to load.

Q. Will you please to explain to me the custom that existed in the season of 1894–'95, that is, in October and November, 1894, in relation to the loading of cotton at Westwego?

A. We just sent our ships there, to get whatever was ready for delivery and sign for it.

Q. What was the first step in the process?

A. Oh, we would try and find out how much there was there for us, that they were ready to deliver.

Q. Did you receive written notifications on the subject?

A. We received, from time to time, what they call transfer slips, which we took to be notifications of the arrival of cotton and
60 readiness for delivery. Our custom in relation to these transfers was to return them to the railroad with the order to deliver to a specific steamship either at Westwego or about due at Westwego.

Q. Having received these transfer slips from the railway company, you returned them to the railway company?

A. As soon as we were ready to take delivery of the cotton. The custom that existed as to the actual delivery of the cotton to the ship was the same all over the port, namely, the receiving officer of the ship counts the cotton and signs a receipt for it; the same with the Illinois Central depot; it's the same with the Southern Pacific, and it's the same with all the roads.

Q. Can you give me the size of a bale of compressed cotton, such as came from Texas in the season of 1894–'95, the average size?

A. Say about 26 cubic feet.

Q. And can you give me its length, height and depth?

A. I should say it would average about 5–2 by 2–9 by 2; somewhere about that; that's only my guess of it.

Q. Prior to the erection of the dock at Westwego, which was burnt in 1894, where was cotton delivered to your line for transportation by the Texas and Pacific Railway Company?

A. At the city wharves.

Q. Mr. Warriner, you are familiar with Westwego?

A. Thoroughly so.

Q. Will you describe Westwego as it existed prior to the erection of this dock?

A. I never was over there before the erection of the dock.

Q. Do you know whether there were any docks erected there prior to the erection of this dock which was burned?

A. I don't know of anything there at all. I never knew of any ships landing there prior to that time. There were no facilities there for loading ships with cotton prior to that time to my knowledge. Cotton was never shipped from there prior to the erection of these docks to my knowledge.

61 I am familiar with the customs and usages existing at New Orleans relative to the shipment of cotton from that place to a foreign port, and was familiar with such customs and usages in 1893 and 1894.

Q. When, first, to your knowledge, Mr. Warriner, was any freight delivered to steamships at Westwego?

A. I think in the fall of 1894.

Q. Prior to that time, was cotton or other freight ever delivered to your line at Westwego?

A. No.

Q. What kind of freight is handled at Westwego?

A. Cotton, grain and staves. Through cotton.

Q. All through cotton?

A. All through cotton.

Q. In 1894, was Westwego within the port of entry of New Orleans?

A. It was discovered afterwards that it was not legally within the port of New Orleans, but we never had any trouble about going there until 1895, I think it was.

Q. Prior to the erection of this dock at Westwego, was cotton consigned to foreign ports shipped from Westwego at all?

A. Not to my knowledge.

Q. According to the custom and usage at the port of New Orleans as it existed prior to the season of 1893–1894, would cotton consigned to a foreign port be delivered to a ship at Westwego?

Mr. TAGGART: That is under the same exception.

The COURT: Is that prior to 1893?

Mr. TAGGART: Yes.

The COURT: Objection sustained. The fire was in the fall of 1894. It was prior to the time the dock was opened.

Exception by plaintiffs.

Q. How long subsequent to that time did cotton consigned to foreign ports begin to be delivered there?

A. Between the season ending in 1893 and the season commencing in the fall of 1894.

Q. Prior to the erection of this dock did you consider Westwego as being commercially within the port of New Orleans?

Objected to. Objection sustained. Exception by plaintiffs.

62 Q. Under what circumstances, Mr. Warriner, did you know of any vessel going to Westwego to receive cotton in 1894?

A. I don't know as I quite understand that. I never sent a vessel to Westwego to load cargo without having previously made some arrangement with the railroad company.

Q. In November, 1894, did you have any arrangement with the Texas and Pacific Railway Company relative to the receipt of cotton by you from it?

A. We had a number of contracts to carry cotton from New Orleans to foreign ports where we had agreed to take it at West-

wego if a sufficient quantity was there. The arrangement as to a sufficient quantity was that we wouldn't send a ship for less than two thousand bales or so, so as to keep us working at least a whole day.

Q Was any time specified or understood between you and the Texas and Pacific Railway Company at which you should go to Westwego to receive cotton after it arrived there?

A No; the delivery on both sides was unrestricted.

Q Did the Texas and Pacific Railway Company ever give you any notice that you were bound to take or receive cotton at or within a specified time?

A No; there was never any complaint made to me by the Texas and Pacific Railway Company that I did not receive cotton on time that I know of.

Q Then do you mean to say, Mr. Warriner, that in the season of 1893–1894 you would not send your vessel to Westwego for less than two thousand bales?

A That was our practice then. And prior to the erection of this wharf we did not send our vessels there at all.

Q Did you ever have any arrangement or contract with the railroad company to go to Westwego for less than two thousand bales?

A I don't remember of any. We have taken less than two thousand bales at Westwego, certainly. It might suit us sometimes to take less. If we were at Southport we might drop over to Westwego and take whatever they had, and we did that, I think,
63 in several instances. When we did go to Westwego for less than two thousand it was to suit our own convenience.

Prior to the erection of this dock, when the Texas and Pacific Railway Company offered cotton to us for transportation by our ships we received such cotton at the city wharves.

Q In 1893–1894, if the Texas and Pacific Railway Company had offered you for transportation on your ships less than two thousand bales of cotton, where, by the custom of the port of New Orleans, would such cotton have been received by you?

Objected to. Objection sustained. Exception.

Q Mr. Warriner, how was cotton received by you for transportation on your ships at docks other than your own docks?

A In the same way that it was received on our own dock, exactly. The cotton was tendered, and the mate or receiving officer counts it and signs a receipt for it.

Q Will you please state whether or not such cotton was required to be placed at any particular point before it would be receipted for by the officer of the ship whose duty it was to receive it?

A The cotton was placed within reach of the ship's tackle, always. This custom was universal to my own knowledge. By "within reach of the ship's tackle," I mean within a reasonable distance of the ship's tackle—abreast the ship.

Q If cotton tendered to a ship of your line at a dock other than the dock of your line had not been placed within reach of the ship's

tackle, would such tender have been good according to the custom of the port of New Orleans?

A. Not in my opinion. They would have to truck it to within the customary distance. Whoever was making the delivery would have to truck it.

Q. Then do you mean to say if cotton to be transported on one of your vessels had been brought by the railroad company to a point not within reach of the ship's tackle, that the officer of the ship
64 would, if he followed the custom of the port of New Orleans in that respect, have refused to receipt for the same until it was brought within reach of the ship's tackle?

A. Yes, sir; we certainly wouldn't go out in the woods for it. I never paid for the truckage or carriage of cotton from a point without the reach of the ship's tackle to a point within reach of the ship's tackle to my knowledge.

Q. Mr. Warriner, how were vessels to load or discharge cargo at Westwego as distinguished from New Orleans prior to March 20, 1896?

A. Well, up to the fall of 1895, we simply used to send ships there and load without any difficulty at all, but the powers seem to have discovered, somewhere in the fall of 1895, that Westwego was not within the port of entry and they compelled us to get special permission from Washington by telegram. I mean for each particular ship. We would ask the Washington authorities through the custom-house officials in New Orleans two or three days before we intended to go to Westwego, for permission to load at Westwego.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

Q. Mr. Warriner, are you quite positive that during the season of 1893 this cotton wharf at Westwego was not in use?

A. The season of 1893 runs into 1894, and in that case Westwego, in the season of 1893 and 1894, was. It was in use to the best of my recollection in the fall of 1894.

Q. Was it not in use, really, now, during the season of 1893–1894, and this season of 1894–1895, which was just beginning when the fire broke out, was the second season in which it had been in use?

A. No, I think not. My recollection is it was in use in the fall of 1894 for the first time.

Q. Then it is your recollection that in the fall of 1894 it
65 had only been in use two months when the fire actually broke out?

A. My recollection is that it was in the fall of 1894, but I might be mistaken—but I think we then had cotton delivered at the city wharf from the Texas and Pacific.

Q. In the fall of 1894?

A. Yes, sir.

Q. Was not that after the fire?

A. No; before the fire, in 1894.

Q. Have you any means of verifying that recollection?

A. I don't know that I could find it. I haven't tried to verify it, this time.

Q. Is it not a fact that during the season of 1893–1894, there was a considerable amount of export cotton shipped over your line—delivered to the Elder-Dempster line at Westwego?

A. That is in the fall of 1893 and the early part of 1894?

Q. Yes, sir.

A. I don't remember if it was. I could find that out.

Q. And your present recollection, if I understand you, is that this fire occurred in the early part of the first season when that cotton wharf was in operation?

A. In November, 1894.

Q. In November, 1894, and the cotton season begins about September, does it not?

A. Yes, sir.

Q. Then you state that two months after the cotton season began for the first time at Westwego this fire occurred?

A. I may be wrong about that, but that is my recollection. That is my present recollection.

Q. But you *not are* really positive about it when you come to reflect?

A. No, I am not.

I spoke of having a number of engagements with the Texas and Pacific. By that I do not mean arrangements to unite with the Texas and Pacific in making the through rate on cotton to points in Europe. I mean that we had a number of engagements to carry from New Orleans to points in Europe. Agreeing to take a certain amount from New Orleans to Liverpool. I knew that the Texas and Pacific would make an arrangement with the shipper, adding
66 to our rate the rate of the Texas and Pacific in making the through rate. That was true.

Q. Well, that does make it a Texas and Pacific engagement at a through rate in that sense?

A. I don't know whether it does or not; all our engagements were simply to carry the cotton from New Orleans. And we agreed to take our proportion of the entire rate, that is, to receive our rate from New Orleans to the other side, but we didn't know where the cotton was coming from. We might suspect that on that sort of an arrangement the Texas and Pacific Railway Company would name our line in the bill of lading which it would sign as the one to carry from New Orleans to Liverpool, or whatever European port it was. I knew that it had been done.

Q. And had received copies of the through billing under an arrangement of that sort constantly, did you not?

A. We received copies of the through bills of lading issued by the Texas and Pacific.

Q. And you received copies of those bills of lading in which the agent of the railroad company signed, not only for the railroad company, but for the steamship company on that through bill of lading, did you not?

A. That's not my understanding of it at all.

Q. I ask you, if you did not receive copies of such bills of lading?

A. We received copies of the bills of lading that they issued.

Q. And which purported to be signed for both the railroad and steamship companies?

A. Which they signed, and under which they agreed to carry the cotton to Europe.

Q. Which was signed by them in language something like this: That the railroad agent was signing for the railroad and steamship, and that he had signed three of like tenor and form, one of which being accomplished the others to stand void?

A. I never read any bill of lading of that sort.

Q. Were any bills of lading for shipments, say, under con-
67 tract number forty-four, which you remember, do you not?

A. Yes, sir. Copies of those would sometimes come into our possession; they did generally. And they generally named the Elder-Dempster line as the line from New Orleans to the other side.

Q. And whatever was in those bills of lading you would have some knowledge of, wouldn't you, generally?

A. No; we would have knowledge that a certain lot of cotton represented by the bill of lading was going to be carried under contract number forty-four.

Q. Now, these masters' receipts, in many cases, would correspond with that through bill of lading, would they not?

A. Supposed to have everything on them put on the master's receipt.

Q. Did you have a through bill of lading also?

A. For the purposes of identification.

Q. And the through bill of lading which you would issue would be a recapitulation of what was on the railroad bill of lading?

A. The master's receipt would.

Q. And in many cases did not the master's receipt refer to this original bill of lading which was issued by the railroad company and which was the original?

A. Cotton was signed for on such a date by such a person at such a place under bill of lading number so and so. That is to say, shipped at Paris, Texas, on through bill of lading number thirty-nine, T. & P. contract number forty-four, and that original would go to the consignee in Europe, and we received the master's receipt with copy of bill of lading attached, and supposed it had everything correctly copied that was on the bill of lading they issued. That master's receipt would refer to the original bill of lading issued at Paris, Texas.

Q. And would be the instrument by means of which the consignee would receive that cotton from your steamer line at Liverpool?

A. The master's receipt is the instrument. I don't know what would become of the original bill of lading issued at Paris. I suppose it would go to the consignee.

68 Q. Go to the consignee also, would it not, and those two together would be the authority for him to receive the cotton?

A. For delivery on the other side.

Q. And then you would get that bill of lading—would not that bill of lading accompany the draft?

A. I suppose so in the usual course of business; that was the custom, I suppose.

Q. And that draft would be paid and the party would acquire an interest in that shipment through the payment of the draft which has the original bill of lading attached?

A. I suppose so; that's the way they do it.

When this freight was turned over at Westwego, the steamship line paid the Texas and Pacific its proportion of this through rate, which was named in the through bill of lading. And the balance of the freight was collected on the other side by the steamship company as to its proportion.

Q. That is, the total freight is collected on the other side, and you had already paid the Texas and Pacific its proportion?

A. It was a contract for ocean carriage—a contract that was made with the shipper at the time in the through bill of lading.

Q. Now, then, you speak of delivery within reach of the ship's tackle; do you know how actually the cotton was deposited on the wharf at Westwego and received by the stevedore who went there, as matter of fact?

A. Opposite the ship. I mean opposite the ship on the wharf. And where it could be reached by the longshoremen. How far the cotton was actually placed from the ship I don't pretend to state—within a reasonable distance of the ship's tackle.

Q. What sort of tackle was used in the loading of cotton at Westwego?

A. It was loaded with falls and slings.

Q. Is there any trucking or rolling?

A. There is rolling by the longshoremen in order to sling it to get it on the ship.

69 Q. But when it is not immediately alongside the ship, they either roll or truck it?

A. Sometimes they don't need to do it—just pull it down and sling it to the falls, that is, the nearest cotton.

Q. But that that is farther off they either have to roll or truck?

A. They roll it generally until it is within that distance of the ship. But just how far back it may be put I can't say. But he has nothing to do with it until it is placed within a reasonable distance, not until it comes within the proper limits.

Q. And in what way it is carried to that place you don't know; you only know that as a matter of inference?

A. I know we never paid any of this extra trucking; we paid a certain amount for loading the cotton. What work was done in order to load that cotton at Westwego I am not able, as a matter of fact, to state.

Before this fire, I believe there was actually a large amount of oil cake loaded there at Westwego. I believe there was. I don't know that that was in front of the cotton. I don't know how the cotton was placed.

Q. You spoke about delivery at city wharves before the building

of this wharf. After the building of the Westwego wharf, it was customary, not only for your steamship line, but for all other steamship companies, to call at Westwego and get cotton?

A. I suppose most of the lines did that.

Q. And all export cotton which was required to be carried by rail came to the port of New Orleans, and all that by the Elder-Dempster line was delivered at Westwego, wasn't it, or substantially all, after this wharf was built, the cotton carried by the Texas and Pacific Railway Company?

A. I don't know; I think there was a good deal carried that was delivered to the city front here, in New Orleans.

Q. I am speaking about export cotton for the Elder-Dempster line.

A. I should say, most of it was delivered at Westwego. This Martin, Wise & Fitzhugh cotton was under special contract, delivered here in the city at the sky lot, as we call them.

70 Q. But where there was a general contract for delivery at the port of New Orleans for cotton to be carried by the Elder-Dempster line, Westwego was the point of delivery, was it not?

A. Yes, sir.

Q. What freight was received there?

A. Well, they loaded staves, hard wood and general cargo of all kinds. That was export freight also.

Q. Carried under an arrangement similar to that of the cotton, was it not?

A. Not generally. Was not specially provided for in advance, not generally carried on a through basis such as cotton. Local shippers would make the freight arrangements, and it would be delivered to us at Westwego.

Q. Now, you speak of having to arrange with the customs authorities to telegraph to Washington?

A. Yes, sir. That was after the fire. There was no such trouble prior to the fire.

Q. All that was necessary was a notification to the customs authorities that you were going to load a ship at Westwego?

A. Did not even notify them. Sent our ship over there as you would do to a city wharf, and on an engagement the same as our ship had been loaded by in New Orleans.

Q. Looking at the letter of November 12, 1894, from your company to the Texas and Pacific Railway Company, do you recollect, Mr. Warriner, whether, in addition to the transfers mentioned in that letter you had then any other transfers on hand which had been sent to you by the Texas and Pacific Railway Co.?

A. No, sir; I think we had cleared every one out of the office and sent them back to the T. and P. railroad. We had a good many ships at about that time—two or three of them certainly—and were anxious to get ready for them.

Q. Do you recollect, Mr. Warriner, that on November 12, 1894, the steamship Leyden went up to Westwego?

A. It was about that time—the time of the fire. She had not begun loading. I don't know exactly now what was the reason.

She was very late; she should have been in four or five days before that. She made a very long passage.

71 C. G. MILLER, recalled as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

By Mr. CLEVELAND:

Q. You don't mean to say you sent that original sheet to Elder-Dempster & Company, did you?

A. Yes, sir; the original sheet.

Q. How did you get it back from them?

A. After the fire; in fact, the night of the fire, we sent down to the steamship offices to get what transfer sheets they held to be returned to us, and we obtained some that night from some of the offices, but I believe the office of Elder-Dempster & Company was closed when our man got down there, and we either sent down a man the next day or we communicated with Elder-Dempster & Company and they sent them up to us.

ALFRED LE BLANC, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am forty-five years of age, reside in New Orleans, and am agent of the Harrison line of steamers. I have been the agent for that line nineteen years. I was in that line of business in 1893 and 1894. I have not represented any other lines in New Orleans than the Harrison line. We have two special wharves here in New Orleans. One is at Jackson square, and the other at Picayune tier. We had those wharves in 1894. We have no other wharves except those here in New Orleans. The Harrison line is engaged in carrying between here and Liverpool. That is, both to and from New Orleans. It carries anything that comes along. The steamers of our line carry cotton. And they have always done so. When that cotton leaves New Orleans on our line it is consigned to Liv-

72 erpool. Our line has carried cotton from this port continually since I have been the agent here. In 1893 and 1894 the cotton that our line carried was delivered to our ships everywhere. Cotton was delivered to our ships at other places than at our wharves.

Q. Did you have occasion during those years to receive cotton from the Westwego wharves?

A. I think so; I don't remember exactly, but I am sure we did. I have no recollection as to how much cotton we received at Westwego during those years.

Q. Could you say whether or not you did receive much or little cotton from Westwego?

A. I have nothing to guide me—was that the year that the fire happened?

Q. 1894 was the year of the fire.

A. Oh, yes; we carried considerable. That was in 1894. That cotton was delivered at Westwego by the Texas and Pacific railroad. I think all the cotton delivered to us that year via the Texas and Pacific railway was delivered at Westwego. Before the construction of the wharves at Westwego we carried cotton from the Texas and Pacific Railway Company. Delivery was made at that time, sometimes at their own wharf, on this side, and sometimes at ours. It was all delivered from the New Orleans side of the river. I have been to Westwego. I was never at Westwego before the Texas and Pacific Railway Company built there. I do not know of any vessel that ever discharged a cargo, or any part of it, at Westwego prior to the erection of the wharves there. I don't remember any. I am familiar with the customs and usages existing at this port—that is, New Orleans—in relation to the shipping of cotton from this port to foreign ports.

Q. And you were familiar, I suppose, with such regulations in the year 1893 and 1894?

A. I don't believe they have varied since then.

Q. Were there any custom-house restrictions at that time and prior to March 20, 1896, that you know of about steamers going to Westwego and loading there or discharging there?

73 A. My recollection is that we used to have to have a custom-house officer there; I don't know that there were any other restrictions. We had to enter before we went there. I don't think we had to get permission to go there from the custom-house authorities; announced our intention of going there and they sent an officer. The Government paid for that officer. The shipper or ship did not have to pay for the officer.

Q. In whose charge were the wharves at Westwego—who had charge of them?

A. The Texas and Pacific railroad. Their permission had to be obtained before vessels went there. I never sent a vessel to Westwego to load a cargo without having previously made or obtained some arrangement with the railroad company.

Q. Would you go to Westwego to receive any minimum amount of cotton from the Texas and Pacific Railway Company?

A. Well, I wouldn't go there for less than 1,000 or 1,500 bales, but there was nothing definite, just a sort of an understanding. That understanding was with the railroad.

Q. With what official of the road?

A. I don't know what he was called. There was no written contract.

Q. Will you state whether or not in 1894, or the year that the Westwego wharves were burned, you had a contract with the Texas and Pacific Railway Company to transport any certain amount of cotton?

A. I am sure we had; different contracts. We made engagements from day to day. We did not have a general contract with them. These contracts that I speak of were in writing. No time was specified in those contracts, at which we should go to Westwego for the cotton.

Q. Did you ever have any complaint from the railroad company that year, that you remember, stating that the cotton had not been moved by your line within a specified time?

A. I don't remember any—there was no specified time. The minimum amount of cotton that our vessels would go to
74 Westwego for at that time was a thousand to fifteen hundred bales.

Q. Then, as I understand you, none of your steamers would go there to take any amount of cotton less than 1,000 bales?

A. No; we wouldn't agree to do it in advance.

Q. According to the custom in New Orleans at that time, if you had an arrangement to take, say less than 500 bales of cotton coming from the Texas and Pacific Railway Company, where would that delivery have been made?

A. Probably at our wharf.

Q. That is, on the New Orleans side of the river?

A. Yes, sir.

Q. How was the cotton delivered by the Texas and Pacific Railway Company to your line in New Orleans, on your wharves?

A. Delivered in drays. Brought to our docks and landing on drays by the drayman at the railroad's expense. I never paid for any such transportation.

Q. How was the cotton, at that time, received for transportation by your line of vessels, Mr. Le Blanc?

A. The drays put it on the wharf and we received it; your question is rather vague—the dray brought it down to the wharf, the drayman unloaded it, and we were on the wharf and signed a receipt for it. When we received cotton at wharves other than our own, and at docks other than our own, it was put on the wharf, and when the ship went there an officer counted it and receipted for it. That cotton was required to be placed within her reach before it could be receipted for by the ship's officers. By "within her reach," I mean so we can get to it; within reach of the ship's tackle, is the common expression. "Within reach of a ship's tackle" literally means where the ship's ropes can get on to it, so that the ship's winches can pull it.

Q. If the cotton was tendered a ship of your line, not at your dock or not at your wharves, and the cotton was not within
75 reach of the ship's tackle, would that cotton be received by the ship's officers?

A. I don't think so, unless there was some arrangement made by the railroad for trucking. We might, in exceptional cases, accept it there, but I don't know of any. Such truckage, without special arrangement, would be paid for by those who delivered it.

Q. In 1894, please state whether or not you had any arrangement with the Texas and Pacific Railway Company relative to receiving cotton from that road.

A. I don't quite understand your question; we used to make engagements for cotton, and when it came in we went there for it, but we had no special arrangement—just like anybody else. We went to

Westwego for it, and everybody did; there was no special arrangement.

Defendant's counsel reads from the deposition, as follows:

Cross-examination by Mr. TAGGART:

I had been the agent for the Harrison line in New Orleans for a number of years before 1894. When I said that our ships received cotton everywhere, before 1894 and 1893, I meant that they went to various points to receive cotton. I should think the bulk of the cotton carried by the Harrison line was received at other points than their own wharf. That custom was universal with steamships landing here in New Orleans. That is, at the terminals of railways the steamship lines were all accustomed to receive cotton which was shipped over the various rail lines which was to go from the rail lines to the steamship lines. It was also, for a long time before that, a custom for the steamship lines and the rail lines to unite in making what we call a through rate, which was a combining of the local rates of the two. That is, the railway company at the point of shipment would make a through rate to the shipper in Liverpool we will say. And that would
76 be based upon a contract with the steamship company, by which the steamship company would accept a certain portion of that rate from the railway, as its share of the carriage. Those are the kind of contracts or arrangements that I speak of that were in force in 1894 between our line and the Texas and Pacific Railway Company. And it was in accordance with this custom, or an arrangement of that sort that the reception of the cotton by the steamship lines was the terminus of the railway. And that was so in the case of the Texas and Pacific, and had been so for several years before 1894.

Q. When you speak of a minimum amount of 1,000 bales of cotton, do you mean that would be the minimum amount you would enter into under one of these contracts?

—. No, sir; we wouldn't go to Westwego unless there was at least that amount there.

Q. But you would go there; where you had made one of these contracts, and there was a balance of a shipment which was included in that contract which had not yet been taken?

A. We would have to do it.

Q. That would be a part of the contract, wouldn't it?

A. Yes, sir.

Q. It was the understanding, was it not, that in these written contracts for through rates Westwego was the place of reception by the steamship company of the cotton?

A. Yes, sir.

Q. And that had been so for some years prior to 1894, hadn't it?

A. I think so.

Q. This wharf at Westwego is not the only wharf of the kind where similar shipments are made, is it?

A. No. There were not many others. There were only two

others. And there were in 1894, they were at Southport and Gretna. Gretna is opposite New Orleans, on the west bank of the river, the same side as Westwego. A little further down, near the city. And Southport is higher up, and on the east side. On the same
77 side as the city of New Orleans. The same method of handling and receiving cotton was observed there.

Q. Now, you say the railway company had no authority to sign a bill of lading for the Harrison line. This cotton which you agreed to receive at through rates for Liverpool, you had an arrangement with the railroad company that it should be shipped at not exceeding a certain amount per 100 pounds; was that the arrangement?

A. Yes. I think those contracts all had for their basis 100 pounds. At a certain rate per 100 pounds.

Q. And your understanding was that you had entered into an arrangement with the railroad company to receive from the railroad company that much cotton at that rate?

A. Yes, sir.

Q. At Westwego, in the case of the Texas and Pacific?

A. Yes, sir.

Q. And whatever arrangement the railroad company made with the shipper, you understood was made on behalf of the railroad company for its proportion of the rate, and on behalf of the steamship line for its proportion?

A. Yes, sir.

Q. Now you say that in 1894, when you wanted to ship from Westwego, you gave notice to the custom-house officials and they would have an officer go to Westwego?

A. That's my recollection. It used to be the custom, but whether it was in 1894, I really don't remember. I don't know whether it still obtained in 1894; there is nothing to fix the date. I never had any trouble in getting an officer to go, or anything. The only thing required was a mere notice, just a form.

Q. Your recollection, as I understood you to testify, was that there were no shipments of the character I have described—through shipments—of cotton, in 1894, where the cotton was delivered to your dock?

A. No, I don't remember any.

Q. Whatever shipments of cotton, then, you made from your two wharves in New Orleans, were what we may call exceptional shipments, not in the general mass of shipments that you were
78 engaged in carrying?

A. No, they were smaller amounts from smaller roads, and for "spot" shippers. And for individual shippers.

Plaintiffs' counsel reads from the deposition as follows:

Cross-examination:

Q. And to that extent, then, the railroad company did have the right to make an arrangement with the shipper of this cotton, did he not?

A. Yes, the agent is supposed to take it that way, but our liability only began when we got the cotton.

Q. Whatever cotton was at Westwego, which you had arranged for under one of these, what I would call through shipments, you would call for, as a part of your arrangement with the railroad, wouldn't you, under the written contract?

A. Each contract stood by itself.

Q. Exactly; and suppose you had made a contract for 10,000 bales at a rate of $1.49 and you had carried 9,500 of those bales in previous shipments, you wouldn't wait, in order to make a new contract, in case the remaining 500 bales were there, ready for shipment, and you were advised of it, would you, before sending for it?

A. I think we might; I don't know.

Q. You think you would?

A. I think so.

Q. Suppose that was the last of the season, would you let it remain there, or would you expect the railroad to bring it to your wharf?

A. I think the railroad would have to bring it to our wharf.

Redirect examination by Mr. CLEVELAND:

Q. You stated that it was an understanding, Mr. Le Blanc, that your vessels would not go over to Westwego for less than a specified number of bales. About how many, did you say?

A. One thousand or fifteen hundred.

Q. Do you know of any of your ships going over there for less than a thousand bales?

79 A. I don't know of any special case; they may have done so, where it may have suited us. Where it may have suited us to let them go, we would do so. Under the arrangement I had with the Texas and Pacific, I do not consider that I had to go there for less than that number of bales. Under that arrangement I could have declined to send my vessels there for less than that number of bales. If I went there for a smaller number of bales, it would be only when it suited my convenience to do so.

Q. When cotton was delivered beyond the reach of the ship's tackle, Mr. Le Blanc, do you know who would pay for the additional truckage to a point within reach of the ship's tackle?

A. Well, I don't think it was ever delivered beyond the reach of the ship's tackle. We employed men, at so much a day, to load the cotton, and to load it from within reach of the ship's tackle. It has to be brought out either by the dray, or trucks, or the railroad trucks, and when it is brought there the ship receives it. She doesn't receive it away off at the end of the wharf; doesn't sign for it until it gets down to her, brought there either by the railroad company or the longshoremen; that's an arrangement between the stevedore and the railroad men, the getting of it down to the proper place, but the ship doesn't receive it until it is alongside of the tackle.

Defendant's counsel reads from the deposition as follows:

Recross-examination:

Q. Let me see that I understand the last answer. The longshoremen is paid by the steamboat company?

A. Well, he is paid by the middle man; we have a contract with a man called the stevedore, who employs the longshoremen. I don't know, as a matter of actual fact, how far this longshoreman would truck the cotton, it's not my business; that's a matter between the stevedore and the railroad. The stevedore is very likely to
80 make the railroad truck it. But what actually did occur at Westwego, in that respect, I don't know. I don't suppose I was at Westwego in 1894 more than two or three times before the fire. I think I was there about a week before the fire.

Q. And you didn't observe, particularly, this matter of loading the ship, or the trucking of the cotton, or anything of that sort; that didn't concern you, because it didn't relieve you of any of the expense that you were under?

A. No, it did not concern me.

Cross-examination:

Q. Suppose the remaining portion had been delivered at Westwego, did you ever know of a case where you compelled them to bring that to your wharf?

A. No, sir; I don't know of any case.

Q. And you don't know what you would do under that arrangement, then?

A. No.

Redirect examination:

Q. You say that the custom of receiving cotton at Westwego, in answer to Mr. Taggart's question, had been in vogue for several years prior to the fire?

A. Yes, I think so.

Q. How many years—do you know, sir?

A. No, I don't remember; ever since the place was built, I suppose.

Q. That custom didn't prevail before those wharves were built, though?

A. No, hardly, sir.

Q. When you say it was the custom to go to Westwego for cotton, you mean, after the arrangement with the Texas and Pacific Railway Company, do you?

A. We didn't go there unless we had an engagement for some cotton; there would be nothing to go for. That is, an engagement with the Texas and Pacific Railway Company. They to give us so many thousand bales of cotton; if we didn't book anything we wouldn't go.

Q. You wouldn't receive, or would you receive cotton at
81 Westwego, without a special agreement with the railway company, or could you receive it that way?

A. Yes; if they hadn't made an engagement there would be no cotton to receive; they would make an engagement to give us so many bales, and when it came in we would call for it, but if there wasn't any engagement there would be nothing for us to go over there for.

W. J. HAMMOND, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am fifty-one years of age and my residence is in New Orleans, and I am a steamship agent. I have been engaged in that occupation since 1875, in New Orleans. Prior to 1894 I represented a great many lines—no particular line, and the same in 1894. I have one wharf at the foot of St. Mary street, in the city of New Orleans, but I load many of my steamers at the different terminals as well. Those lines were engaged in carrying cargoes from here to Europe; cotton, grain and general cargoes. Prior to 1893 cotton was delivered to our ships for transportation by whoever we engaged it from; we engaged from the Texas and Pacific Railway Company all the time. Some was delivered at our wharf on the New Orleans side and some at Westwego; ever since the wharf has been built we sent our steamers over there on certain conditions. Prior to the time the wharf was built when there was no place to send them, of course we didn't send them there. Then it was delivered on the New Orleans side of the river at my wharf, or other landing places of my steamers. I am familiar with Westwego. Prior to the time the dock was erected which was destroyed by fire in 1894, there were no docks at Westwego that I know of. I never landed any ships there prior to building the dock. I don't think there were any facilities there for loading or discharging ships. I never went there before that.

82 Q. Prior to the time the dock was built, was there any commercial business done at Westwego, to your knowledge?

A. Not to my knowledge.

Q. Did you ever know of a vessel to discharge her cargo or any part of it at Westwego prior to the erection of this dock?

A. I don't remember any, sir. I was familiar with the customs and usages existing at New Orleans in 1893 and 1894. I don't think there has been any change. Prior to the erection of this dock there was no freight delivered to our lines for transportation at Westwego that I can remember.

Q. When first was it so delivered?

A. Indeed, I forget the date that Westwego was built. I can't remember that.

Q. What kind of trade is handled at Westwego?

A. We go over there for cotton and oil-cake and other cargo.

Q. Through cotton?

A. Through cotton only. Prior to the erection of these docks I don't think that cotton consigned to foreign ports was shipped from Westwego.

Q. When, prior to the erection of this dock, was cotton consigned to New Orleans delivered there by any road—by the Texas and Pacific Railroad Company?

A. The Texas and Pacific used to deliver to us on the New Orleans side.

Q. Was the cotton consigned to New Orleans ever delivered at Westwego?

A. I couldn't say that—it looks quite unlikely though.

Q. Mr. Hammond, according to the custom and usage of the port of New Orleans, as it existed in the season of 1893 and prior to the season of 1893 and 1894, where would cotton consigned to foreign ports have been delivered to the ships—cotton engaged from the Texas and Pacific?

A. Well, if it amounted to a certain quantity we would go over there to take it.

Q. I am speaking of prior to the erection of the wharves at Westwego?

83 A. They delivered at the New Orleans side at our wharves or wherever our steamers laid on the New Orleans side.

Q. After the erection of this dock, how were vessels allowed to load their cargoes at Westwego as distinguished from New Orleans?

A. Made arrangements to go there for a certain quantity and we went. I made such arrangements with the Texas and Pacific Railway Company.

Q. Could vessels, within your knowledge, go to Westwego to load cargo without special permission from the custom authorities?

A. No, we always got permission because it wasn't within the New Orleans custom district at that time. After that it was made part of the port of New Orleans, but I forgot the year exactly.

Q. What was the nature of this special permission?

A. Simply to notify the custom authorities that we desired to go there. I never knew a vessel to go to Westwego to load her cargo without first having notified the customs authorities.

Q. Under what circumstances do you know of any vessels going to Westwego to receive cotton in 1893?

A. Well, no differently from today.

Q. Did you ever send a vessel to Westwego to load her cargo without having previously made some arrangement with the railway company, and without sending a notification to the custom-house?

A. We always had to get permission and have an engagement with the Texas and Pacific before going there, because it was their own wharf and we had no right to go there unless we had it.

Q. In November, 1894, at the time of this fire, did you have any arrangement with the Texas and Pacific Railway Company relative to the receipt of the cotton by you from it?

A. I couldn't tell without looking at my engagements. I always made engagements, say, from one hundred bales to five thousand.

Q. Was there any arrangement between you and the Texas and Pacific Railway Company as to the number of bales which
84 you would go to Westwego to receive?

A. It was always understood we should not go there for less than one thousand bales; on account of extra cost of towage involved and the loss of time, it wouldn't pay us to go there for a smaller quantity.

Q. Was there any time specified in which you should go to Westwego to receive cotton from your line?

A. It depended upon the engagement made with the railroad. I mean that in the season of 1893–1894 I would not send my vessels to Westwego for less than 1,000 bales unless it suited me, unless it suited my own convenience. But prior to the erection of these docks I did not send my vessels there at all. I never had any arrangement or contract with the railway company to go to Westwego for less than 1,000 bales. I have sent a vessel to Westwego for less than 1,000 bales. I couldn't tell you how much less—merely a matter of convenience to us. Simply a matter of my own convenience.

Q. Did you ever know of a vessel going to Westwego to load cargo without having made some special arrangement with the railway company?

A. That I couldn't say; I can only speak for myself as to that.

Q. And as to your own line?

A. That's all. It was always tacitly understood that I would not go for less than a thousand bales, and they never demanded that I should go there.

Q. Prior to the erection of this dock or docks, had the Texas and Pacific Railway Company offered cotton to you for transportation on your ships, where would that cotton have been received?

Objected to as immaterial. Objection sustained. Exception by plaintiffs.

—. In 1893 and 1894 we were receiving cotton at our dock in New Orleans all the time. We received from the Texas and Pacific Railway Company, I presume, because we engage every year with them.

In 1893 and 1894, if the Texas and Pacific Railway Co. had
85 offered me for transportation on my vessels less than a thousand bales of cotton, by the custom of the port of New Orleans such cotton would have been received by me at the city front wharves. Cotton was delivered to my wharf in New Orleans by the Texas and Pacific Railway Company in the usual way by drays. The Texas and Pacific Railway Co.'s draymen drayed it.

Q. Did you ever pay for such drayage?

A. All cotton must be delivered at the ship's side at the expense of the shipper.

Q. How was cotton received by you for transportation on your steamers?

A. Received alongside of the ship by the mate. By alongside of the ship I mean at the ship's wharf—within reach of the ship's tackle—to use a common expression. If cotton tendered to me for shipment over my line, at a dock other than the dock of my line,

had not been delivered within reach of the ship's tackle, such tender would not have been good according to the custom of the port of New Orleans. It must be delivered within reach of the ship's tackle.

Q. Then, do you mean to say, if cotton to be transported on one of your steamers was brought by the railroad company and delivered not within reach of the ship's tackle, that the officer of the ship would, if he followed the custom of the port of New Orleans in that respect, refuse to receipt for it until it was brought within reach of the ship's tackle?

A. He could do so. I never paid for truckage for the carriage of cotton from a point not within reach of a ship's tackle to a point within reach of a ship's tackle. I pay the stevedore so much a bale.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

I am the agent for the Ross line, the Thomson line and other lines composing what is called the Hammond lines, com-
86 posed of a lot of lines, a number of steamships which I was endeavoring to obtain freight for and making engagements for from time to time. I was the agent of these lines in New Orleans. You cannot call them regular in the same sense as the Harrison and West India lines. They are composed, some of them, of regular lines because they send the ships the same as other lines, but, of course, not as regularly as Harrison and West India lines. Some of them are tramps and some of them are not. They come and go as freight is plentiful or not plentiful. What I call the Hammond lines is composed of a number of ships of that sort which I can reach and get for the purpose of transporting freight. I have one wharf here in the city of New Orleans which I use to load general freight at for these ships. I say that prior to the erection of this wharf at Westwego any cotton delivered by the Texas and Pacific Railway Company was delivered on the New Orleans side. It is what we call the "city front," and is where ships are loaded from the elevator or from Eighth street down to the water works and below Canal street.

Q. And that is composed of some 30 or 40 wharves?

A. Not quite so many; ten anyway. It is a continuous levee for about a mile and a half. It had been granted us by the corporation and we had not room there and so we had to go in other places where we could put a ship in. The Texas and Pacific Railway Company did not have a wharf for export here on the New Orleans side prior to the erection of that one at Westwego. They used to deliver at our wharf, where our ship was. That might be at any one of these docks in the city.

Q. Now, then, that custom was about the delivery of cotton from the Texas and Pacific Railway Company here along the city front on this side, the New Orleans side, prior to the erection of this wharf, after the erection of the wharf at Westwego, that was the recognized place of delivery for export cotton, was it not?

A. At Westwego—it was their terminal.

87 Q. And the steamship company goes over there in order to get this cotton for export on its steamers?

A. Oh, yes, they go there; that is, for a certain amount of cotton.

Q. And in making arrangements for this export cotton, it is the custom of your line as well as other steamship lines to make an arrangement for what is known as a through rate for cotton, is it not?

A. Yes, sir.

Q. For the shipment of two thousand, four thousand or six thousand bales, as the case may be?

A. For 100 bales—any quantity. We make arrangements with the railroad, naming them our sea rate, and they add on to it whatever it costs them to bring it to the ship's side. Those things are booked every day—fifty bales, one hundred bales, a thousand bales, or ten thousand bales.

Q. And the sea rate is the rate from the point of terminals of the railroad?

A. From the time it comes into the possession of the steamer until it reaches its destination. That destination is Liverpool, Bremen, Havre or other European port.

Q. And it is the custom, to your knowledge, is it not, for the railroad company to make a contract with its agent at the point of shipment for a through rate, is it not, from the interior?

A. Yes, sir.

Q. And the custom is this, is it not, as an example: The representative, we will say, of the Gulf, Colorado and Santa Fé railroad arranges for the delivery by the railroad company at the port of New Orleans, he arranges with respect to the service to that port, and then arranges from the port of New Orleans to Liverpool: that is the custom, is it not, to your knowledge?

A. Yes, sir. They would make an arrangement in the interior, say, at one dollar and a half through rate—we would get fifty cents and the railroad one dollar.

Q. And the railroad agent would make a stipulation with the shipper respecting the obligation of the railroad company for its proportion?

88 A. The ship is only responsible from the time she takes charge for the sea rate.

Q. But you understand that the railroad agent can make an arrangement with respect to the obligation of the railroad company for its proportion, that is, put in the bill of lading, and also for the steamship company for its proportion?

A. With the rate which the railroad agent makes in the interior with the shipper we are not concerned, that is his own private business, we are not supposed to know anything about it. Wherever a through bill of lading comes to us and that bill of lading reads say one dollar and fifty cents, why, that is the through rate, and we take the freight on the bill of lading and forward it on what is known as a through rate, but in some cases these bills of lading are changed here for local bills of lading, that is, in some instances.

Q. In those bills of lading based upon shipments under arrangements such as you describe for a through rate, it was customary, was it not, to describe the point at which the railroad would deliver the cotton as New Orleans; don't you know that?

A. Always.

Q. And that was understood to be Westwego, was it not? In the case of the Texas and Pacific, between the steamship lines?

A. Yes, sir; that is the way we understood it for not less than a thousand bales. After Westwego was built that was the understanding, but I am at a loss to know exactly when it was built. And after this arrangement it was delivered at Westwego.

Q. And when New Orleans was named, Westwego was included in that term as far as the Texas and Pacific was concerned?

A. Yes, sir.

Q. Now you state, Mr. Hammond, that in 1894 you had some deliveries of freight from the Texas and Pacific Railway Company along the city front—have you any recollection of the Texas and Pacific delivering any other cotton in the year 1894 to any of your ships?

89 A. Well, I could tell by going to the office, but I cannot remember. From memory, I could not.

Q. What would you say as to your best recollection on the subject whether or not any export through cotton was received from the Texas and Pacific at any other point than Westwego in the year 1894 by your line?

A. I couldn't remember, because we preferred going to Westwego. We also received through export articles. Oil cake, and when the elevator was built at Westwego, we received grain, hardwood lumber, staves and everything. Cotton-seed meal and cake, and I think we have received provisions too—general cargoes.

Q. Now, you say you always had permission of the railroad company, you mean by that that you did not go to Westwego unless it was for some of these articles which you had arranged for export shipment?

A. That was the only reason we would have for going there.

Q. But you do not mean any permission apart from that?

A. We would of course have to ask the wharfinger if there was room to go in there.

Q. But as to the question of room you never had any special permission from the railroad company?

A. When we were going to send a ship there we always made inquiry, always asked them, and never went in without permission.

Q. But by that you do not mean to say that you required permission from the railroad to go there?

A. I consider that equivalent to asking permission.

Q. I want to know just what you mean when you say you consider that as asking permission.

A. It was a private wharf and we couldn't go there without permission.

Q. The same arrangement obtains for cotton at Southport?

A. Southport, the Stuyvesant docks and Chalmette.

Q. It is limited in capacity?

A. Well, limited capacity of course to a certain extent. And I did not want to send a ship until I knew there was sufficient
90 freight there to warrant me in going. And when I was informed as to a certain quantity of freight being there for shipment by steamer, it was a question for me to determine whether to send the ship or not. The stevedore that I speak of is employed by me to load the ship at so much a bale. And so far as he is under anybody's direction he is under the steamship company's direction. I have been inquired of respecting the getting of cotton within reach of the ship's length. That is generally understood to be on the wharf, alongside the ship, where it can be reached by the men, either by the railroad or trucking it. We have nothing to do with that, we pay a certain price per bale. It does not make, really, as a matter of fact, any difference how far off it may come, we pay so much a bale to have it put aboard the ship. I don't know anything about what they pay to get it from the place at which it was pointed out to them or how far they have to go to get it, but of course they take pretty good care that they don't spend too much money on labor. They limit their labor as much as possible; don't truck it any further than is absolutely necessary; trucking is not necessary unless it is a considerable distance. I don't know, as a matter of fact, whether they ever truck it at all, because I seldom go to those places.

Plaintiffs' counsel reads from the deposition as follows:

Cross-examination:

Q. But you understand that the railroad agent can make an arrangement with respect to the obligation of the railroad company for its proportion that is put in the bill of lading, and also for the steamship company for its proportion?

A. With the rate which the railroad agent makes in the interior with the shipper we are not concerned; that is his own private business; we are not supposed to know anything about it. Wherever a through bill of lading comes to us and that bill of lading
91 reads, say, one dollar and fifty cents, why, that is the through rate, and we take the freight on that bill of lading and forward it on what is known as a through rate; but in some cases these bills of lading are changed here for local bills of lading, that is, in some instances.

Q. That is another matter, and that is what you refer to, is it not, when you say they have no authority to sign bills of lading?

A. We do not care about the rail rate. We simply desire to get our sea rate on the shipment from here and, of course, the agent in the interior may sign a through bill of lading which will include the rate from that interior point to the point of delivery and we do not give authority to any one to sign bills of lading.

Q. But you know it has been the custom for agents in the interior

to make bills of lading covering the rate for this entire shipment, do you not?

A. We know that they sign bills of lading in that way, but we do not know exactly the rate until after the bills of lading are here. When they reach here, of course we see then what the rate is, but we have nothing to do with the signing or giving of rate by the agent there.

Q. And this was the custom to your knowledge, was it not, that those bills of lading the agent signs for the railway and the steamship company?

A. He signs—for instance, the Texas and Pacific agents sign for large quantities of cotton by the Hammond line in the interior, and when it comes to us we name the steamship or sea rate.

Q. And those bills of ladings are signed in that way by the railroad agent in the interior in a form somewhat similar to this: "I affirm to three bills of lading of this tenor and date one of which being accomplished the others to stand void," &c. is not that it?

A. Yes, sir; the railroad agent signs by the Hammond line the same as they sign by the Harrison line.

Q. And you accept those bills of lading in the case where
92 you do not get a special local bill of lading out for the sea lines?

A. We accept them and give what is called a master's receipt, which master's receipt incorporates the contents of the through bill of lading; that is, the bill of lading which the railroad agent signs.

Redirect examination by Mr. CLEVELAND:

Q. Mr. Hammond, when the railroad companies sign a bill of lading on behalf of the steamship company, you understand that only applies as to the rate?

A. We have nothing to do with it—we never give any power to any railroad to sign, we take no responsibility until the cotton is in possession of the steamer.

Q. Has the railroad company any authority to bind you by the conditions of a bill of lading?

A. No road can bind us; we can only be bound by our contract or engagement, which reads according to the rules of the maritime association.

Q. Prior to the erection of this dock, was Westwego considered commercially within the port of New Orleans?

Objected to. Objection sustained. Exception by plaintiffs.

Defendant's counsel reads from the deposition:

Recross-examination:

Q. After the erection of the dock it was recognized as commercially within the port of New Orleans—there were regular deliveries at Westwego?

A. We called it New Orleans although it wasn't officially New Orleans.

Q. And under bills of lading for shipment by the Texas and Pacific it means New Orleans, and the Hammond and various lines of steamers received cotton continuously at Westwego, did they not?

A. Yes, sir; since the erection of this dock.

93 W. P. Ross, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am a steamship agent, and have been such in the city of New Orleans 25 years. In November, 1894, I was a member of the firm of Ross, Howe & Morrow, and we handled a large number of steamers, mostly on what they call the "tramp" order. I recollect the labor troubles that existed in New Orleans in October and November, 1894.

Q. Will you give me some account of them, their origin, cause, extent, &c.?

A. They originated in a dispute between the white and colored screwmen, by which the white screwmen boycotted the colored men, or rather, boycotted any employers who employed colored labor, and it reached a very serious condition of affairs, where business was entirely upset and a great deal of business driven away. There was a great deal of rioting and trouble. I recollect the time of the burning at Westwego. I don't recollect the exact date.

Q. At that time had those labor troubles ceased or were they still in existence?

A. They continued off and on during the whole of the winter, from say October. I recollect the burning of the West India docks.

Q. At that time what was the condition of the labor trouble?

A. Well, I don't know that I can explain it further than to say that there was a very considerable feeling of unrest, uncertainty and of fear of what was going to happen. Prior to 1894 I had been engaged in business as a steamship agent about 25 years, about 21 years in New Orleans, something of that sort.

Q. Prior to 1894 did you represent the same line?

A. Well, they varied, you know. In 1893 and 1894 we usually loaded our ships at Sixth street in the city of New Orleans. This was prior to 1894 also. We did not have any other dock in
94 the port of New Orleans that was specially assigned to us. These lines were engaged in carrying all kinds of goods to various ports in Europe. They carried cotton. Prior to the erection of the dock at Westwego, which was destroyed by fire on November 12, 1894, cotton was delivered to my lines for transportation by other parties and the different railroads in town. Some by the Texas and Pacific Railway Company. It was delivered to us by the Texas and Pacific Railway Co. at our regular wharf. It was delivered by all the railroads at our regular wharf; after the erection of these docks at Westwego, cotton was delivered to my

line mainly at the same place. I am familiar with Westwego, but I have not been there recently.

Q. Will you please describe Westwego as it existed prior to the erection of this dock?

A. Just an ordinary levee; there were docks there, I think there was a small one. I recollect landing once in a small ferry-boat. There were no steamship wharves, to my recollection, except occasionally we would discharge railroad iron.

Q. Were there any facilities for loading steamships at Westwego prior to the erection of these docks?

A. Not for handling cotton.

Q. Prior to the erection of this dock, Mr. Ross, was any commercial business done at Westwego, to your knowledge?

A. I don't remember anything, except the discharge of railroad iron; might have been some.

Q. You are familiar with the customs and usages existing at New Orleans relative to the shipments of cotton from this place to foreign ports?

A. Yes, sir; I never did much business there, but I am familiar with what is the usage in that respect—was familiar with these customs in 1893 and 1894.

Q. Did you ever know any vessel to load or discharge at Westwego prior to the erection of these docks?

A. I don't remember any vessel discharging, except perhaps it was railroad iron, and I think that there was some cross-ties loaded there.

95 When, first, to your knowledge, was any freight delivered to a steamship at Westwego?

A. To my knowledge, after the wharves were built there—I forget the exact date of that. Prior to the erection of those wharves, no cotton was ever delivered to my line in Westwego.

Q. When, first, was it so delivered?

A. Well, I don't think we ever sent any ships there; or ships there for cotton at all the early part of the season, when the wharves were burned. It may be we had some there before, but I don't think so.

Q. According to the customs and usages of the port of New Orleans, as they existed prior to the season of 1893 and 1894, would cotton consigned to a foreign port have been delivered to a ship at Westwego?

Objected to. Objection sustained. Exception by plaintiffs.

Q. Did you ever know of any cotton shipped on any railroad from any part of Texas, destined for a foreign port, to be delivered at Westwego on board a steamship, in 1894, without some special arrangement not stated in the bill of lading, having been made between the railroad and the steamship line?

A. No, sir; there would be a contract under which it was shipped to take the cotton. That contract was made between either the shipper or by the railroad and the steamship agent.

Q. At the time of the fire was Westwego commercially the same as the port of New Orleans?

A. Now, I don't recollect the time that it was brought in by act of Congress. It was not so considered before that act was passed, only by courtesy and agreement. Agreement between the railroad and the ship, or the shipper and the ship.

Q. In 1893 and 1894 under what circumstances do you know of any vessels going to Westwego to receive cotton?

A. Well, I can only speak of my own ships; I went there very little, and then only by special agreement either with the
96 railroad or the shipper. That agreement was that we would go to Westwego for a certain amount of cotton at a certain time. We would not go there for any amount of cotton that was there. We would have special contracts for certain amounts. We would agree for a certain minimum amount that we would go there at certain times. The minimum amount for which I would go to Westwego, according to my recollection, was probably in the neighborhood of two thousand bales; something of that sort.

Q. In 1893–1894 do you say that you would not send your vessels to Westwego for less than two thousand bales?

A. That's my recollection of it, as to the amount that we stipulated as the minimum for any one ship. I don't think we ever had any agreement or contract with the Texas and Pacific railway to go to Westwego for less than two thousand bales. I don't think we did.

Q. Did you ever know of a vessel going to Westwego to load cargo without having made some special arrangement with the railroad Co.?

A. No, sir; none of my ships.

Q. In 1893–'94, if the Texas and Pacific had offered you, for transportation on a vessel of your line, less than two thousand bales of cotton, where, by the custom of the port of New Orleans, would such cotton have been received by you?

A. Unless we had made an agreement to go to Westwego, they would have had to deliver it at our regular wharves. Cotton was delivered at my wharf in New Orleans by drays or by the freight lines, by the shipper or railroad. I never paid for such transportation to my recollection.

Q. How was cotton received by you, Mr. Ross, for transportation on your ships, on docks other than your own?

A. Well, if we were crowded at our own wharves, we might arrange to load ships at some other wharf, and then we would receive it in the same manner.

Q. Please state whether or not such cotton was required to
97 be placed at any particular point before it could be receipted for by the officer of the ship whose duty it was to receive it.

A. Had to be placed abreast of the ship—at the edge of the wharf. The particular term for that, according to the rules of the port of New Orleans, is "within reach of the ship's tackle," and that is what is usually meant in that clause of the article. "Within reach of the ship's tackle" means, literally, that it must be where the ship's

"falls" can reach it, but it is modified by custom, especially in the case of cotton.

Q. How was delivery of cotton made, as to the length from the ship?

A. Has to be abreast of her, that is, if the ship is 300 feet long, it is within that 300 feet and at the outer edge of the wharf. The drays back up and it is dumped on to the wood-work of the wharf. Those wharves run from 70 to 100 feet wide. If cotton tendered to a ship of my line, at a dock other than the dock of my line, had not been within reach of the ship's tackle, such tender would not have been good, according to the customs of the port of New Orleans unless by agreement. I mean to say that in the absence of an agreement, if this cotton which was to be transported in my ship, had been brought by the railroad company to a point not within reach of the ship's tackle, the officer of the ship, if he followed the custom of the port in that respect, would refuse to receive it until it was brought within reach of the ship's tackle. I may have paid for the truckage or carriage of cotton from a point not within reach of the ship's tackle to a point within reach of the ship's tackle under some special agreement, but irrespective of any special agreement, I don't remember.

Defendant's counsel reads from the deposition, as follows:

Cross-examination by Mr. TAGGART:

Q. Mr. Ross, did you represent any particular line of
98 steamers in 1894, or was it simply "tramp" steamers that would come and go?

A. We represented the French line; I believe the Anchor line, and most of the rest of the business was "tramp" business. Some of these lines were regular and some were running occasionally, as business demanded. I did not have any cotton on the wharf at Westwego destined for any of my lines, at the time of the fire. I don't think I had any engagements for cotton with the Texas and Pacific railway outstanding at the time of the fire.

Q. You speak of special arrangements with the railroad company for delivery at Westwego; do you mean an arrangement such as has been testified to here, by which there would be an engagement for a stipulated number of bales of cotton at a certain sea rate, and the railroad company would thereupon go into the interior and arrange with shippers for the shipment of that cotton over their own lines and over the steamship lines with which the sea rate was made?

A. I mean, the railroad would make a contract with the steamship agent, just exactly as any shipper would do, for the carriage of a certain amount of cotton on the terms specified in that contract, that was the special arrangement I refer to. A part of that special arrangement would be that I would go to take such freight at Westwego.

Q. Don't you know that under those steamship contracts, when they would speak of a sea rate, we would say of 49 cents a hundred

pounds, from New Orleans to Liverpool, that it was the general custom, without specifically mentioning Westwego in the contract, for the steamships to receive that cotton at Westwego?

A. Most positively, no.

Q. You don't know?

A. Most positively, not.

Q. You say, in your case, Westwego was always named as the place of delivery, if it was the place of delivery?

A. I say, when we went to Westwego, we did so under a special arrangement to go there. And not otherwise.

99 Q. Then, if no place was named in the contract, fixing the sea rate, Westwego would not be the point of delivery, according to your understanding?

A. Not without a special agreement; no, sir.

Q. That special agreement as to delivery, do you know whether that was expressed in these contracts respecting the sea rate or not?

A. I don't know what was done with other agents, but in my office it was always expressed; I did very little business with the Texas and Pacific.

Q. You don't know how it was with the other steamship companies which did the bulk of the business?

A. I don't know how they managed their business.

Q. You know, however, that a large amount of export cotton after the wharf at Westwego was built, was delivered to the steamship lines at Westwego?

A. Yes, sir.

Q. And that the delivery of export cotton at any other point, by the Texas and Pacific, had almost entirely ceased, had it not?

A. As far as direct arrangement between the railroad and ships wes concerned.

Q. As far as you know, the delivery of export cotton by the Texas and Pacific railway at any point other than Westwego had largely ceased, had it not?

A. As far as any direct engagement with the Texas and Pacific on through bills of lading, it did, but it did not cease as far as other export cotton was concerned.

Q. That is, export cotton originating at New Orleans—local shipments—it did not cease?

A. Coming from the Texas and Pacific.

Q. Coming from the Texas and Pacific railroad—that would be what they call F. O. B. cotton?

A. Yes, sir.

Q. But so far as other cotton was concerned, the delivery would have been at Westwego, as you understand it?

A. Yes, sir.

Q. But cotton on other bills of lading, embodying the inland or rail rate or the ocean or steamship rate, was largely delivered,

100 if not entirely so at Westwego, if there was no other stipulation in making the agreement?

A. Yes, sir.

Q. Well, do you know that they made any express stipulation in any agreement without first having the steamship rate?

A. I can't say what was done in that respect. I made the stipulation in that regard in my own case, but I don't know as to the others, naturally.

Q. Now, did you ship anything else at Westwego than cotton?

A. I don't remember going there for anything, except by special agreement.

Q. But you did make large shipments of other things than cotton?

A. Oh, yes; we had a ship up there just finished at the time of the fire. We were shipping oil cake on her. That was a shipment made by a local party in New Orleans. A shipment made locally; that is, a local shipper had arranged for my ship to call at Westwego to take the freight. That was my point of reception for that freight. It was not on a through bill of lading issued originally by the Texas and Pacific Railroad Company to my recollection. I was accustomed to call there for staves, too, whenever the amount was sufficient and it suited us to do so. My arrangement for the shipment of this oil cake was an arrangement made with the shipper. He told us that he had a certain quantity over there, told us what the quantity was, and we agreed to call at Westwego for it at a certain rate per 100 pounds or ton for Liverpool or wherever it was destined for. That is all the arrangement I made about taking that shipment. And all I was required to make. When I learned it was there ready for shipment I sent the steamship over there for it and got it. Of course, we had to see that the wharf was clear. We were in communication with them by telephone. That was the extent of the arrangement I made, and all I had to do was to ascertain whether there was a place there at which the ship could load.

101 M. J. SANDERS, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am a steamship agent at New Orleans, and was such in 1894. I represented the West India and Pacific Steamship Company. I had represented that company in New Orleans about ten years prior to that time. Our regular wharf is at the foot of Celeste street, in the city of New Orleans. We did not have any other dock in the port of New Orleans. That line was engaged in general transportation, carrying freight to and from New Orleans; we carried cotton.

Q. Prior to the erection of the dock at Westwego, which was destroyed in November, 1894, where was cotton delivered to your line for transportation?

A. Well, we had cotton delivered to us at the different railway terminals and at our own wharf.

Q. Where were the terminals at which cotton was delivered to you?

A. There was the Illinois Central terminal at Southport. I think

at that time we used the Southern Pacific at Gretna, and I suppose the Texas and Pacific at Westwego also.

Q. I am speaking of the time prior to the erection of this dock.

A. I presume the Texas and Pacific was then delivered to us at our own wharf, but are you not wrong about the date of the erection of the Westwego wharf? I don't think I know exactly the date, but prior to that time I think the cotton would be delivered to us on the city front at our wharf.

Q. After the erection of this dock at Westwego, where was cotton delivered to you for transportation by the Texas and Pacific railroad?

A. At Westwego, as a rule. I could not state how much cotton was delivered to us at Westwego. I could not give you the exact quantity.

102 Q. During the season of 1893–'94, there was considerable cotton delivered to your line by the Texas and Pacific Company at your wharf?

A. That I can't say without referring to my books, but I presume there was, the rule being that if they had over there at any time, say 2,000 bales, we would go to Westwego for it, and if they had a small quantity which they wished us to take, perhaps part of an accumulation, say less than two or three thousand bales, it would be delivered at our wharf.

Q. You were familiar with Westwego, Mr. Sanders?

A. Yes, sir.

Q. Will you describe Westwego as it existed prior to the erection of this dock?

A. Well, I didn't know it prior to the erection of the dock, except as a part of the general river front, without any improvements on it. I don't think there was any dock there nor any facilities for loading ships there. I don't think there was any commercial business done there prior to the erection of this dock. I never knew of any vessel loading or discharging cargo at Westwego prior to the erection of this dock. I was familiar with the customs and usages existing in the port of New Orleans relative to the shipments of cotton from that place to foreign ports; and was familiar with such custom and usage in 1893–1894.

Q. When first, to your knowledge, was any freight delivered to a steamship at Westwego?

A. That I can't answer with any exactness without referring to my books, beyond saying that it would be since the Texas and Pacific railroad had built their wharves there.

Q. What kind of freight is handled at Westwego?

A. Mostly cotton, until they erected a grain elevator, and then it was grain also. Through cotton—yes, sir; nothing but through cotton. I don't think that cotton consigned to New Orleans was ever delivered there.

103 Q. According to custom and usage in the port of New Orleans, as it existed prior to the season of 1893–1894, would cotton consigned to a foreign port have been delivered to a ship at Westwego.

Objected to. Objection sustained. Exception by plaintiffs.

Q. In November, 1894, did you have any arrangement with the Texas and Pacific Railroad Company relative to the receipt of cotton by you from it?

A. It is difficult for me to answer that without my books again, but I have no doubt that I had engagements with the Texas and Pacific Company at that time.

Q. In November, 1894, Mr. Sanders, did you have any contract or arrangement with the Texas and Pacific Railroad Company relative to the number of bales of cotton that would be delivered to your ships?

A. We had a general understanding that we would not send the vessels to Westwego, unless there was a certain quantity of cotton ready for delivery to us at one time; that quantity, I believe, was fixed at 1,500 to 3,000 bales, and we would not send our vessels for a smaller quantity than, say 2,000 bales. If the railroad had less than 1,500 bales of cotton for transportation over our lines it would have been delivered to us in November, 1894, at our own wharf, at the foot of Celeste street. I never had any arrangement or contract with the Texas and Pacific Railroad Company to go to Westwego for less than 1,500 bales that I know of.

Q. Did you ever know of a vessel going to Westwego to load cargo without having some special arrangement with the railroad company?

A. I don't know of any such arrangement. Of course, each ship agent would make his own arrangement on such a matter as that.

Q. How was cotton delivered on your wharf in New Orleans by the railroad company?

A. By the Texas and Pacific Railroad Company, I think, usually by dray. The railroad paid for the draying.

104 Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

Q. Mr. Sanders, you speak of an arrangement with the railway company for taking cotton at Westwego; that was an arrangement for booking cotton at a special rate per 100 pounds—a sea rate?

A. Yes, sir.

Q. Those bookings were made from time to time, and for different amounts?

A. Yes, sir.

Q. And, after this wharf at Westwego was built, those bookings continued just the same as before, did they not, sir?

A. Yes, sir.

Q. And under those bookings, at a rate of a certain number of cents per 100 pounds, sea rate, the railroad company would go into the interior and arrange with shippers for a shipment at a certain through rate?

A. That is the way I understood.

Q. Which would be a combination of the railroad rate and your agreed sea rate?

A. Yes, sir.

Q. And the railroad agent would issue through bills of lading to the shipper?

A. Yes, sir.

Q. Before this wharf was constructed at Westwego, on that export cotton, or through cotton, the place for delivery would be at a wharf on the city front in New Orleans?

A. As a rule, yes, sir.

Q. As a rule, was it sometimes at the Texas and Pacific wharf in New Orleans?

A. I think on occasions it has been at the Texas and Pacific wharf on the New Orleans side.

Q. And at other *other* times at a wharf of a particular steamship line?

A. Yes, sir.

Q. Now, after Westwego was opened, then cotton shipped in that way, was shipped to Westwego and there received by the steamship lines, was it not?

A. As a rule, with the modification that I have already mentioned, that a certain quantity or number of bales must be there at one time, for delivery.

105 Q. Was that ever embodied in any agreement with the railroad, or was it simply a general statement by the steamship lines, that it would not pay them to go there for less than about 2,000 bales?

A. I think, so far as my line is concerned, my understanding is that it was probably in writing. I think it was in writing. I won't be positive about that. I won't say that positively. I am not positive about the agreement being in writing, but I should be inclined to think, now, that it was; but I think that after the erection of the wharf at Westwego all cotton was loaded there, that is, all export cotton, so far as our lines was concerned.

Q. That is the delivery of export cotton, in the city of New Orleans, along the front, had about practically ceased?

A. Yes, sir.

Q. And in the season of 1894, after the season opened, the bookings would be made then for account of any of the main lines of steamships here in the city, would it not?

A. Yes, sir.

Q. At any time?

A. I should think so.

Q. And particularly during the months of October and November, when the shipments were very heavy?

A. Oh, yes.

Q. Now, these through bills of lading which were issued you, you have seen them from time to time, have you not?

A. Yes, sir.

Q. They were regularly issued by the railway companies on

behalf of the railway and steamship companies, together, were they not?

A. Yes, sir.

Q. Covering both parties of the line, the ocean line and the rail line?

A. Yes.

Q. And copies of them would go to the steamship lines, would they not?

A. Yes, sir.

Q. And the railway part of the line, was usually described as from the point of shipment to New Orleans, was it not?

A. Yes, sir.

Q. And the ocean or steamship part of the line was New Orleans to Liverpool or whatever the port the cotton was destined for?

A. Yes, sir.

Q. And the point of delivery from the railway company
106 to the steamship line under that class of bills of lading was always understood to be Westwego, was it not?

A. Yes, sir; under the modifications I have expressed.

Q. And that even where the bookings did not express that, the port of delivery was at Westwego?

A. Yes, sir.

Q. There were other shipments from Westwego than cotton, was there not? That is, other articles were shipped from there besides cotton and grain?

A. Yes, I think there were, though I am not sure that in 1894 shipments other than cotton or grain amounted to anything of moment.

Q. Were there not considerable shipments of oil meal and cake?

A. Not over our line. I can't speak for the other lines.

Q. Didn't you have a considerable amount of staves or hard wood?

A. I don't think we had at that time, but there has been quite a trade since then. Our line handled principally grain and cotton, those articles constituted the principal part of shipments by our line.

Q. The grain wharf was practically part of the cotton wharf, at Westwego?

A. Well, there was a gangway on the front of the grain-carrier, which connected with the cotton wharf, but it is not of sufficient width to enable any loading of cotton at the grain wharf. Our line of steamships runs regularly from New Orleans to Liverpool.

Q. And how frequently, once a week or twice a week, or how?

A. Well, in the winter season, twice a week.

JOSEPH W. COFFEY, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

My name is Joseph W. Coffey; I am employed at the Boston warehouse, and am twenty-eight years old. I reside in New Orleans

and have resided there all my life. I was employed at one time by the Texas and Pacific Railway Company. I was first
107 so employed in the season of 1893. It was not quite the fall of 1893 when I began. I labored for a while before the fall season had actually set in. In 1893 I began by working around the freight sheds, laboring. During the season of 1893–'94, after the business picked up, I obtained a position as check clerk at the Thalia Street depot. During the season of 1893–1894 I worked at Westwego. I don't recollect just about what time I went up there, but I was transferred up there. I think the season was pretty well advanced. I worked up there in 1894 until the season was over; I think it was about March or April; as check clerk. After March or April I remained in the employment of the Texas and Pacific Railway Company for a little while. I am not too positive about these months—these dates; but I remember, after leaving Westwego, I came back to Thalia street and labored. I was there a month or two after that. In the summer of 1894 I traveled for a publishing house in New Orleans. I left the employment of the railway company; I don't know that I done it of my own accord; there wasn't anything more to do.

Q. They dispensed with your services and you got other employment?

A. Well, that is about what it was. There wasn't enough work. I would only make a day or two out of a week, and I left. I was reemployed by them the following season. I went to work in September of 1894. I began to work in September, right at Westwego. I think I watched a day or two—maybe a week. Then I checked. As a check clerk—we would be handed a copy of the bills, that is, what we called a skeleton, and we would check the freight from that. We would get what we call a skeleton waybill covering a shipment, say, of cotton, the marks of the cotton and the number of bales, and we would see that the marks of cotton came out as entered on the waybill and the amount of the cotton. I had a gang of laborers under me. In 1894, my immediate superior or boss or fore-
108 man, at the beginning of the season was a man by the name of Woodruff who was, I understood, the foreman. The chief clerk, Mr. Wilkinson, told me to go to him for advice. Mr. Wilkinson was superintendent at the cotton wharf. He was not the superintendent during the previous year. He came up there in the latter part of the previous season as clerk. Then in the season of 1894–1895 he was made superintendent; he took charge.

I usually worked seven laborers under me in checking cotton. I directed the laborers where to put the cotton, the seven men that I had in charge. In the course of my duty I would place cotton in the shed, on the dock, whenever we would find room, except there was different places allotted to different shipments, for instance, Bremen had a particular spot as long as we could hold it. Havre would have another particular place, and so on. We had a place where we would put the Liverpool cotton. We adhered pretty much to that classification, as much as possible. In directing the laborers where to place the cotton I visited the different portions of

the sheds. I went all over the sheds. From September, 1894, I think, I continued to work there as check clerk until about February, I think it was, and then I was given a position as night watchman, in 1895. I don't know how long I remained as night watchman, I suppose about two months. After that in the season of 1895–1896 I moved over to Westwego and kept a boarding-house, made arrangements to have a boarding-house there. Done a little planting and so on, just enough to make a comfortable living. I moved from over there about August, 1896, and I am now engaged by the Boston Warehouse Company.

I don't recollect exactly the date of the fire at Westwego. I heard the other day it was the 12th. I thought it was between the 10th and 20th. But I recollect the fire, whatever the date was. I was working there the day of the fire. I had been working continuously prior to that time for some time before that as check clerk.

109 Q. Now, Mr. Coffey, will you be good enough to describe to us the condition of the sheds, as far as the cotton is concerned, as they existed on November 12th, which was the day of the fire; describe how the sheds were filled with cotton; whether they were filled with cotton?

A. Well, pretty well full, it was piled all over the shed, sir, and there was a space between the two sheds that was not covered and there was cotton piled up there. That portion that I speak of had no wooden covering over it. Cotton was piled there. At the end of No. 2 shed, between that and the end of the wharf some cotton was headed up out there on the river edge.

Q. Between the track and the river was there any cotton piled?

A. There was two tracks—one on the end of the wharf and one on the river end of the wharf. There was one track between the shed and the river. There was cotton between that track and the river. That cotton was just headed up. I don't know the number of bales that were headed on that space between the track and the river on the day of the fire. That amount of space I think would hold between two and three hundred bales headed up—more or less. I did not count them. It was a part of my duty at that time to deliver the cotton. I used to help the laborers when there would be two vessels. I don't think there were any vessels loading cotton on the 12th day of November. I can't tell how long before November 12th I had delivered any cotton to a ship.

Q. Now please to describe how near the bales of cotton came to the inner rail of the track which was between the shed and the river?

A. It came to the edge of the shed, and, in some instances, we would let the bale project a little over the edge of the shed about four or five feet; four feet anyhow from the inner rail of the track. There was cotton placed four feet from the rail. That was stored. By stored I mean just piled up. Each bale placed flat.

Q. How was the cotton piled through the sheds—how
110 many tiers high?

A. I should judge eight or nine bales high. There were gangways running across the shed about three or four to each shed.

Q. And between each gangway how many lengths or tiers of cotton were there running from the river?

A. I couldn't say that. About three or four gangways to the shed. I don't recollect how many lengths of cotton there were between any of the two gangways. It didn't run in lengths over the shed; it would run in the width—I mean so many tiers, one tier this way and another at the side.

Q. How wide were those gangways that ran across the sheds?

A. Usually two, six or seven feet wide; wide enough on November 12th to run a bale of cotton through on its side. These gangways were large enough to allow the passage of trucks; one truck could go through with one bale on it. They were not large enough then to have two trucks pass each other in the gangway. About November 12th, as near as I can recollect it, these gangways were a little crowded, and my instructions were to head some of the cotton up against the tiers, in order to save room and unload the cars. In the gangways I mean; but always leave room enough for one truck to go through.

Q. And then this cotton that was piled up in the gangways; did you put any cotton on top of those bales?

A. Some little, yes, sir; two or three bales. We had to save room; we put them on top of the bales headed up.

On November 12th before the fire I was checking; I might have turned out some few bales of cotton; I might have done that during the day. When I knocked off on November 12th it was about 22 or 23 minutes after five. We usually knocked off at half past five. I don't recollect why I knocked off earlier that day, except it might have been that I completed my car just about that time, and there was not time between then and half past five to justify me in opening another one. I could not give you an estimate of how
111 much more room there was on that dock for stowing cotton after I ceased work on November 12th. I don't think there was very much, though. I should think possibly there might have been half a day's more work, that is, unloading.

Q. At the close of each day's work do you know what was done in relation to the cars that had been unloaded, what was done with the cars that were unloaded; were they left there?

A. Only left there temporarily; but after that they were pulled out the last thing every evening. As a general thing we would go there in the morning and find full cars, whether they were put there the night before or in the morning I couldn't say; but the last thing in the evening they would pull the empty ones out and bring a loaded one in. We would find loaded ones there in the morning. There were two tracks on the wood side of the shed. I should judge those tracks extended about thirty or fifty yards above the further end of No. 2 shed—room enough to haul about two or three box cars. The cotton was not unloaded from the cars that were run on the track on the river side of the shed. I don't recollect of their loading or unloading cotton there. Cars were run there for staves

and meal and seed, but not for cotton. I don't recollect of unloading cotton.

I did not have any charge of the fire apparatus on the dock at all. Mr. Wilkinson was the superintendent. Mr. Woodruff was the foreman for a while, and in November, 1894, Frank S. Sykes.

Q. Did you observe while you were there the conduct of Mr. Wilkinson enough to tell us what his habits were?

A. Well, I couldn't help observing them; yes, sir. He would appear there now and then pretty well drunk.

Q. You have seen him drunk during business hours?

A. I have seen him drunk.

Q. Frequently or infrequently?

A. I don't know what answer to give to that. I have seen
112 him occasionally, maybe once or twice a week, when I noticed he had been drinking. I have noticed some fire-hose there on the small platform. I never saw that hose stretched that I know of. They never stretched it at night, that I know of. The posts at which the hose was were in the center of the shed, taking the river and the woods side of the sheds. I never measured the sheds. I have noticed the plugs to which the hose was attacked or near which the hose was. I should judge they were about an ordinary man's height from the floor of the wharf; maybe a foot or two higher. The platform was I suppose about half a foot higher than the end of the plug. These piles of cotton reached higher than the platform.

Q. Will you please describe a little more fully, if you can, the stowing of these bales of cotton in the sheds?

A. They usually run, whenever we would observe the rule, they would run what we call a bulkhead. That would be the highest part of the tier of cotton. We would measure out, as a general thing, our place for stowing, and make allowance to get 50 bales in, or so many bales as we could, from the river side to the woods. We would begin on the river edge of the shed up towards the woods and run our bulkhead up and our tier up and then back to this wooden bulkhead again, and run it this way.

Q. That is, the straight part of these piles would be next to each other?

A. Would be back to back. I did not know, at any time, of reports being made of how many bales of cotton there were in the shed from day to day; but I understood it was an evening occurrence. I don't know who made the immediate report, but I think the foreman was supposed to make the report to the office clerks. There was no telegraph operator in the office on the sheds. There was a telegraph operator at Westwego, at the elevator office. That office was about two or three hundred yards from the elevator, I suppose. I never
measured the size of the pipe that led through the centre of
113 the shed prior to the fire. I only know of one water pipe being underneath the floor of the shed. I have no knowledge of how that pipe was fed. I understood it was fed from that large tank beside the elevator. I do not know the capacity of that tank. I don't know exactly the height of the bottom of it from the ground.

I should judge that it would be about 10 or 15 feet up, between 10 or 15 feet.

Q. Was the floor of the wharf higher or lower than the levee where the track ran?

A. There was no track where the levee ran. The track was away inside of the levee. There was only one levee on the inside track, or the track that runs along the woods side of the sheds did not run on the levee; it ran on an elevated bedding for the tracks. It was not the same height*h* as the levee; it was arranged so it would place cars on the same height*h* as the wharf. The levee was a great deal higher than this track; it was quite a distance up from it. I should judge the levee was about on an equal height*h* with the flooring of the wharf. I have noticed the construction of the tank that was near the elevator, and I want to call your attention to something that I said about that. I said 12 or 15 feet, but it was higher than that. From the bottom of the tank to the ground was more than fifteen feet.

Q. What did that tank rest upon?

A. Well, I don't know what you would call them—piles or scantling, 4-inch. The foundation of the structure upon which the tank rested, was below the level of the levee. I couldn't say how much the foundation of that structure upon which the tank rests is below the level of the ground surrounding it.

Cotton was piled in the open space between the two sheds, the same as under the shed, about eight or nine bales high. Some parts of it were covered, I think, at that time; I am not too positive though. I don't know how many tiers there were in that open space. I know there was about as much as we could get in there. I
114 couldn't say whether there was any empty space in which we could put any more cotton. I don't recollect of any empty space there. We never worried ourselves about any empty space until morning. We just went around looking where we could put the cotton the handiest and easiest. When I was looking around on the morning of November 12th, where to put the cotton, I didn't have any difficulty in finding an empty space; not on the jump—not first off—but we had a little more work towards evening, finding any empty space. I couldn't tell how much cotton I unloaded during the day of November 12th. An average day's work in stowing cotton would be about seven or eight cars for the gang. I lived at that time at New Orleans. I first heard of the fire after I had gotten home, sitting down eating supper. I suppose I had been eating ten or fifteen minutes when I heard of it. I should judge it was about half past six or seven o'clock, somewhere, when I first heard of it. I was about a mile from the New Orleans side of the Westwego ferry, I think. I don't recollect receiving any general instructions from Mr. Wilkinson as to unloading cotton; we usually got instructions from the foreman, that was Mr. Sykes. I got no instructions from him unless there was something unusual to be done. I was instructed every night where to store, how to store and how to check cotton. He sometimes gave us instructions as to any haste in unloading. Maybe at times he would come out and tell us

boys, "Well, hurry up folks, we want some empties; let's see what we can do today," and then we would urge the negroes on.

Q. Now, particularly, a few days prior to November 12th and on November 12th, will you state how the different lots of cotton in those sheds were stowed, I mean as to their destination? Were they kept separate?

A. I think they were, yes, sir.

Q. Was all the Bremen cotton in the Bremen place?

A. The Bremen place. It was our aim to keep it, as near
115 as we could, in a separate place. Liverpool cotton the same way. I think there was a place for Havre cotton at that time.

I should judge there was about eight feet of clear space of platform on the floor between the woods side of the platform and the first cotton; something like eight feet. We begun to pile cotton there. With the exception of the cotton that was headed in the gangways I do not know of any cotton that was headed under the sheds at that time. The flooring of this dock was wood; wooden planks. They were placed close together at that time, I think; I don't think there were any cracks between at that time.

Defendant's counsel reads from the deposition, as follows:

Cross-examination by Mr. TAGGART:

I think I left Westwego wharf on the evening of November 12th on the first ferry-boat after knocking off work. I don't know about what time the ferry-boat left that evening. I should judge that it couldn't be very long because a number of the boys missed it, and it must have been owing to that that they missed it. It must have left immediately or shortly after. I went right home, and after being at home a time I had my supper; and while I was at supper I heard of this Westwego fire. One of my sisters opened the back door and told me there was a fire. That is from showing the reflection. I don't know the exact time. I went over to Westwego some time after. I finished eating, which I suppose took about 10 minutes more—10 or 15 minutes. I started to walk, and I suppose it took me 15 or 20 minutes to the ferry; and after I got up there I remained there about 15 or 20 minutes or half an hour, and then crossed over on the next boat. When I got up to the ferry I could see clear across to Westwego from this side of the river. I got to
the Westwego ferry on the New Orleans side about seven or a
116 quarter after seven; something like that. The wharf and sheds at that time were all a mass of blaze. That is, the cotton sheds. The wharf that we are speaking of. Nos. 1 and 2 sheds. This tank that I was inquired of was a tank of considerable size, a good big tank. I don't know what the foundation was; there was some heavy timber on top of that, scantling or spiling. I wouldn't want to say what was the height of that portion of the tank from the roof because I haven't the slightest idea as to measurements. The tank itself—the body of the tank—was placed on top of this heavy timber frame.

The tank itself was of considerable height, a great big height. It was more than fifteen feet. I corrected my statement. I did say about fifteen feet, but I corrected it and said it was more. I don't know how many feet it was though.

As I recollect the situation the tank was higher than the floor of the sheds where the cotton was stored. I should think that it was higher than the roof of the shed. This cotton platform or wharf on which sheds Nos. 1 and 2 were erected was between the levee and the river. And in times of ordinary high water, that high water would come under the wharf. Not all the water entered under there though except in unusually high water.

PAUL J. LECORGNE, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

My name is Paul J. Lecorgne; I reside in New Orleans, and am a clerk. I was formerly in the employment of the Texas and Pacific Railway Company. I first worked for them in 1893 a few months, and went to work for them in 1894. I really couldn't say what two months in 1893. I think it was in the early part of the season. In 1894 I think I started—I know I worked up to September, I
117 think it was. I worked there until November 12, 1894, the time of the fire. I was discharged the next day. I have since worked for them. I think, two or three weeks at the Merchants' warehouse. We went from Westwego to the Merchants' warehouse after the fire. After that I worked for the National Cracker Company; done a little coffee and tea business, and from there into the cigar business.

In November, 1894, I was a check clerk for the railway company.

Q. Will you please to describe to me what duties a check clerk performed?

A. Well, it's this way. We get a bill and go to the cars, when there is a car with cotton, check it as it came out, and whatever post we would place it at, mark it on a tag and put it on the cotton. In November, 1894, I lived on Magazine, near Upperline, in New Orleans. I was employed at Westwego. My hours of work at Westwego were from seven until half past five, and sometimes it was six when we would leave there. I worked at this checking business all the time. During October and November, 1894, I think there was at least four or five other check clerks there. My immediate superior or foreman or boss was a young man by the name of Sykes. I don't know where he is now. I was at work on November 12, 1894, checking as usual. Cars loaded with cotton discharged the cotton at the wood side of the shed, as I called it, that is toward the land side.

Q. Will you please to describe the condition of the sheds on this dock as they existed on November 12, 1894?

A. Well, the cotton was very crowded on the platform from one end to the other, hardly any room for any more. There were two

sheds, one called No. 1 and No. 2. No. 1 was the one nearest the elevator.

Q. Take No. 2 shed, the one furthest up the river, and then describe to me a little more fully, if you will, its condition as to cotton.

A. Well, it was very crowded. In fact, both were very crowded; just as crowded as could be. I don't think there could have been any more bales put on the platform. Cotton was stowed be-
118 tween the eave of the shed toward the river and the track between the sheds and the river; it extended out toward the inner rail of that track that was between the shed and the river, just enough that a man could pass in some places; very close.

Q. Will you describe how it was piled up there?

A. Well, some piles would run out, and we would store it up, starting from the shed, very high, and go down, and some was stowed sideways; in fact, stowed as best we could put there. I think it averaged nine bales high. It came within a couple of feet of the roof. I suppose, in some places it was very high. There were no gangways lengthwise of No. 2 shed, running parallel to the river. There were gangways that were across the shed. I will say three to four in each shed. We were supposed to leave gangways to run from where we unloaded the cars to the river front, and I suppose between each we had about four piles crosswise, and in between each we would leave a gangway. That is, between each gangway there were four piles of cotton. The cotton was all piled or stored at that time. There were four lengths of cotton about, between the gangways. Some of these gangways were about five feet wide and others just enough to leave a truck go through there sometimes.

Q. You have said that cotton was stowed outside of the line of the eaves of the shed toward the track that was between the sheds and the river. Do you mean to say that that was so, as to both sheds, or only as to No. 2 shed?

A. Both sheds. And the description that I have given of these gangways applies to No. 1 shed as well as to No. 2.

Q. Tell me whether there was any space between the upper end of No. 2 shed and the end of the wharf. The upper end of No. 2 and the end of the dock. Was there any wharf there, or dock?

A. There was a small piece of dock, but it was taken up by cot-
119 ton. Cotton was stowed there also. There was a space between these sheds, a square, I will say, and cotton stowed around it. The two sheds were separate.

By an open space between the sheds, I mean there was no floor there. Cotton was stowed between the sheds, in the space that existed between the sheds where there was planking; cotton stowed all around.

A JUROR: Were there any rafters between the sheds?

Mr. CLEVELAND: No; no connection between the sheds.

The COURT: You mean rafters overhead?

The JUROR: No, I mean underneath.

The COURT: You mean stringers—cross-pieces? There were.

The dock planks were not put down in some places. Of course, the piles and stringers and cross-pieces were all there, but they had

not planked them. The frame of the dock was there but not the decking.

By Mr. CLEVELAND:

Q. All around that space, how high was that cotton stowed, do you know?

A. Like the balance, just as high, wherever we could put it.

Q. Tell me how much room there was on that dock to stow more cotton on November 12th?

A. Well, there was mighty little room because we had to hunt for room whenever we wanted to put cotton there—make room.

Q. Did you at any time prior, to November 12th, repile any cotton for the purpose of having or making more space?

A. Yes, sir. Some cotton was stowed loose, a little, and we would stow it up tighter to make room for some more.

Q. Were the different marks of the cotton kept together?

A. Well, whenever we would get a mixed car we would—suppose the car, we will say, had fifty bales, and if there were three different marks, we would make three different piles, put it together
120 and tag them. Fifty bales generally come in a car—some less and some more—generally fifty, though.

Q. Was the condition of the wharf such, during the two or three days prior to November 12, 1894, that you could stow the different lots that came in the different cars at one place?

A. At that time we had it separate. I have seen it that we had to separate a lot and put it in different places; not room enough to stow the lot in one place.

Q. Was the cotton stowed on the land side or the woods side of the shed, as you call it, as it was toward the river, or in a different way?

A. Well, that was supposed to be kept clear, but we would always leave a space, about four feet anyhow, to leave the trucks pass up. About four feet between the cotton stowed on the woods side of the shed and the edge of the platform—the edge of the dock. Cotton was piled up at the lower end of No. 1 shed just as the other was; same way. The office was at the far end of No. 1 shed, down—it was at the far end of No. 1, toward the elevator. I had nothing to do with the office; mine was all outside work. Mr. Wilkinson had charge of the dock; general charge.

Q. Did you notice how he performed his duties?

A. Well, I had nothing much to do with him, only followed Mr. Sykes' orders; but I hardly ever seen him. He was a very rough man. I know what his habits were, as to drinking. I know he drank there some. I have seen him under the influence of liquor many a time during the day. I had no charge whatever of the fire apparatus. I had nothing to do with delivering cotton to ships. On November 12th, I think there were two ships there, one loading cotton-seed meal and the other cotton-cake meal, or whatever you call it. I couldn't say whether they were loading cotton or not. I had no charge of loading either of these vessels; had nothing to do with them.

Q. Did the track on the woods side of the shed extend beyond the end of No. 2 shed?

121 A. I think it landed about a square out further. I don't know of any cotton being covered at all at that time. Cars were generally brought alongside of the platform in the rear of the shed, on the wood side of the shed by the engine, that went up the whole length of the shed. That is the way in which the cars were run on the track in front of the shed, between the shed and the river. I think Mr. Sykes was supposed to be foreman.

Q. What time did you generally return to the city?

A. Well, some evenings I would leave there at half past five and others at six. Mr. Sykes sometimes came over with me, very often we would take the same car. I came right away from Westwego after my business was through; as soon as my work was done I would give in whatever bill I had and leave.

Q. Did you at any time ever notice how the cotton was piled around any of the hydrants?

A. Well, it was piled all around, about nine tiers high. The cotton was piled higher than the hydrants. At that time I don't think we averaged 300 bales that were headed. Those bales that were headed, I think there were a few placed at the far end of No. 2, and a few in between some isles that I know of. I mean gangways. I left the place on November 12th at the usual hour. I suppose it was about a quarter to six when I got to the ferry; half past five, something like that. Generally we left about half past five or a quarter to six, and the ferry-boat would wait for the crowd when the men would knock off.

Q. Where, in relation to the gangways, were the posts at which the hydrants were, do you recollect?

A. The hydrants were situated in the centre of the shed. Those hydrants were supposed to be left in a gangway; some were and others were not. I couldn't say whether all the check clerks were working on November 12th who had been working on November 10th, Saturday, I don't remember. I don't think Trainor

122 was at work on November 12th, as far as I can recollect; I am not positive though. The hose that was near these hydrants was coiled on a little platform on the posts. Coiled on a little platform which was around the post; the platform was, I suppose, six feet above the floor of the dock. Cotton was stowed higher than the platform. The platform was higher than the top of the hydrant.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

I worked up to my usual time that evening. I don't recollect exactly on which part of the dock I was working. I was working about that wharf all day checking cotton; worked up to evening, generally about the wharf. A check clerk's place for checking cotton would be over towards the land side or the woods side of the wharf, where the cotton came out of the cars.

Q. And would his duties call him to other parts of the wharf to any extent?

A. Like in case a car would be at one end, and he got a bill for that car, then he would have to go up towards his car. He would go up to the car, from one to the other.

Q. That is, if I understand you, in doing this work he would have more than one bill at a time; have the bills for a number of cars?

A. Well, no, sir; we were supposed to get one bill and no more, and finish that, the bills for that particular car; finish that and then get a bill for another car, and our new location would depend upon where the location of our car was. And that would take us up on the woods side of the wharf to the new car. The laborers would unload it and we would check the cotton as it came out. I think I left there about the usual time that evening.

Q. And the other check clerks who were working there that day worked up to the usual time, as far as you remember?

A. Well, I am not positive if all was working: I know some.

123 Q. But those that were working that day, as far as you remember, worked as you did, up to about five o'clock or half past, and then quit?

A. About half past five or six we generally leave. I first heard of this fire when I was home eating supper. I heard there was a fire and looked up and seen the reflection. I didn't know whether it was at Westwego or where it was, and I took the St. Charles Street car. I suppose it took me about half an hour altogether to reach home from the time I left Westwego. At that time I was living on Laurel and Jena. That is about a mile and a half I should say from the Westwego ferry on the east side. The river is about half a mile across there. I went to the fire, I took the Napoleon Avenue street cars. I didn't know where the fire was, and rode out to St. Charles and had to walk from St. Charles to the river, and it took a little while to get there, that must be eight or ten squares. I don't know exactly what time I got to the river, I know it was pretty well gone down when I got there. It must have been eight or after when I got to the river. There was nothing there to see when I got there. It was pretty nearly all burned down. It was in full blaze.

Plaintiffs' counsel reads from the deposition, as follows:

Redirect examination by Mr. CLEVELAND:

Q. What took you, in the course of your duties, towards the front or river side of the shed?

A. Well, if I would have a space there I would bring it out there: the only thing that would bring me out there.

Q. What room was there anywhere on the wharf at the close of the day of November 12th for more cotton?

A. Well, mighty little room at that time that I know of. If there was any I didn't know it; mighty crowded.

124 JOHN C. TRAINOR, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am a conductor for the New Orleans Traction Company. In November, 1894, I was working for the Texas and Pacific Railway Company as check clerk.

I don't remember exactly how long I had been working for the Texas and Pacific Company prior to November 12, 1894. I think, I went to work there in September, but I won't be sure, September of that season.

Q. Will you state your age, please, Mr. Trainor?

A. I am 32 years old.

Q. What were your duties as check clerk for the Texas and Pacific Railway Company?

A. Well, we had a gang of men working under us, and our duties were to unload cotton out of cars and store it in the sheds. We never kept any books. We had a skeleton bill they handed us from the office. We unloaded the cars on the bill of lading giving the number of the car and the number of bales of cotton we had to unload and store away. During the month of November, 1894, I did not live at Westwego. I lived in New Orleans. I had to be over at Westwego at 7 o'clock. I would stay, ordinarily, until five in the evening. My whole duties as check clerk were seeing that the cars were unloaded and the cotton stored in the sheds and tagged. As the cars were unloaded by the workmen I had in my hands a paper with the mark of the cotton and what its destination was. I got those papers, from day to day, from the office over at Westwego. The office was near the edge of No. 1 shed; that is, the downtown shed—the lower shed; near the lower end of the lower shed.

Q. Will you describe generally, if you can, the dock at Westwego as it existed on November 12th, 1894—the structure?

125 A. It consisted of two sheds built on piling, and there was a space between the two sheds, which were known as No. 1 and No. 2 shed. The one down the river was No. 1; the one nearest the elevator was No. 1. The one furthest away was No. 2. I never measured these sheds; neither their length, width nor height. They were not enclosed on any side. Along the rear of the sheds—that is, on the line of the sheds—there was a track. In front of the sheds, between the sheds and the river, there was a track. I don't remember whether there was one or two tracks there.

Q. Did you have anything to do with unloading cars that were on the track between the front of the shed and the river?

A. Frequently we had to unload oil cake, usually from the front end. Rarely ever any cotton from that end. On November 12th I was not working. I was there on the 11th; on that day I was checking cars, my usual duty.

Q. Now will you describe to me the condition of those sheds on November 11, 1894?

A. Well, they were piled with cotton, each shed piled up about

eight tiers high; as high as we could get them up; usually about eight tiers high. We started from the extreme edge of the shed and went up and went higher; otherwise there wouldn't be enough space. The sheds were pretty well blocked; that's why I wasn't working on the 12th; didn't have any room for the cotton. Didn't have any more room. There were no gangways lengthwise of the sheds and parallel with the river. There were gangways across the sheds. I don't remember how many piles of cotton there were between these gangways on the average. I don't recollect how far apart the gangways were. I think there were about four gangways in each shed. They were about 3½ feet wide on the average. Could truck a bale of cotton through by placing it lengthwise on the truck.

Q. But sideways of the truck was there room enough to carry it through any of the gangways?

A. There may have been one gangway that usually was
126 wide enough, but sometimes that was blocked. The roof of the shed had considerable pitch.

Q. How far did the cotton extend beyond the edge of the shed or the line of the roof of the shed and the railway track in front of the shed?

A. We had instructions to pile the cotton right up to the edge, but not extend over. Sometimes it extended over the edge.

Q. Do you recollect any of the circumstances of November 11th, of being there at all? What particular thing were you doing on that day?

A. Engaged in the usual duties of checking cotton out and storing it away.

The gangways that I have stated ran across the shed were usually straight. Sometimes the cotton might happen to fall off and block them a little. I don't remember how many lengths of cotton there were between any of the gangways. The posts in the shed were numbered. These numbers were placed on the outside of the post. On every post there was a number. Mr. Wilkinson was in charge of the dock; that is, superintendent. I don't recollect what his first name was. He was in charge during the whole time that I was there. He employed me. He was the superintendent at the time of the fire. He was supposed to have charge of the men and the wharf; we were to work under his direction. I did work under his direction. The man next after Wilkinson was Miller. C. G., I believe, the agent. Wilkinson had several men who worked under him while I was over there. One was named Sykes, one named Coffee, and a man by the name of Ballee Rubia. There was a man by the name of Figures there. He was the chief clerk. These men I speak of were at different times what they called "walking bosses," supposed to have charge of us.

Q. Did you notice how Wilkinson attended to his duties?

A. Well, he was all right in the first part of the day, but in the latter part he wasn't so good. Used to booze a little too much. I couldn't say where he boozed; he had a hammock on the
127 dock that was swung near the office in the rear shed. I have seen him in it during working hours. I don't remember how

often I saw him there during working hours. I saw him a good many times, but I don't remember the exact number.

Q. How early in the day did Wilkinson begin to booze, on the average?

A. Well, about 11 o'clock he was pretty well loaded—I mean by that that he drank heavily.

Q. Did Wilkinson give you at any time any orders?

A. Yes, sir; once or twice, I believe, while I was there.

Q. After 11 o'clock in the day, when you say he was pretty well loaded, did you see him about there, attending to his duties?

A. He would walk around sometimes, making a little fuss; that's about all. By making a little fuss I mean, hello a little—hello to the negroes over there to move around lively. I received my orders directly from the walking bosses usually. These different men whom I have mentioned. In November, 1894, Sykes was the walking boss. I don't recollect his first name; I don't know where he is now; I don't know where Mr. Wilkinson is. I did not continue in the employment of the Texas and Pacific Railway Company after the fire. Immediately after the fire I went to work for Boylan's agency—detective agency.

Q. Do you know what means for extinguishing fire there were on the dock on November 12, 1894?

A. I couldn't say on the 12th, but I know what they usually had there.

Q. Well, describe what you saw there prior to the 12th of November?

A. In each shed there was a big hose, and at each one of the posts there was a barrel of water, and besides that they had fire-buckets with some fluid in them to extinguish fires. There was nothing else; there was a line of hose. I don't know where that line of hose
128 led to. There were plugs on the dock—water plugs. I don't remember how many there were in each shed. I had no charge whatever of the fire apparatus. I don't know the length of any of the lines of hose that were on the dock at the time of the fire; I don't know the size of the pipes to which the hose led. The hose was usually kept coiled upon a shelf. That shelf was near a post in the shed.

Q. Did you at any time notice any cotton near any of these lines or coils of hose?

A. I have noticed cotton there, that would fall over and block it sometimes; they usually move them, though. I never saw that hose tried. There was never any drill of the men on the dock that I saw; drilling of the men to show them how to handle the hose. I don't recollect in what part of the shed those lengths of hose were. I don't remember whether they were in the centre of the shed or in the part of the shed nearest the river, or in the part further away from the river. I had been in the employment of Colonel Boylan before I went into the employment of the Texas and Pacific Railway Company. I worked for him over a year, I know. I was a shipping clerk in the employ of the Texas and Pacific railway part of the time I worked there. I don't remember exactly how long I

was a shipping clerk, but not very long. Then I became a check clerk. As shipping clerk I had to—whenever there was cotton to be delivered to a vessel they sent up from the main office the marks, the number of bales and the ship it was to be delivered to so that we could get it out of the shed, have it trucked on the wharf and get a receipt for them. By sent up from the main office I mean from the New Orleans office, in the city of New Orleans.

Q. In November, 1894, was cotton stowed in these sheds according to its mark, or how was it stowed?

A. Well, usually, if you have a load of cotton or a car of cotton, 50 bales, say, it was trucked out and placed in the shed and tagged; the number of bales and the mark. In most cases, where there was not a mistake, that was done. Those were the instructions, and they were usually followed. There was a place in those sheds for
129 cotton destined for Liverpool, as distinguished from cotton destined for Bremen. I couldn't say whether in November, 1894, the cotton that was destined for Liverpool was all in the Liverpool part of the shed. I know it happened sometimes, when one shed was crowded they used a part of another shed; for instance, the Bremen cotton used the Liverpool shed to put the cotton in there at the time when it was crowded.

JOHN ELLIS, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I live in New Orleans and am thirty-two years old. I am a longshoreman; that is, the majority of times. At present no. At present I am pulling ice for the Southern Ice Company. I have been working as a longshoreman nine or ten years. In 1894 I was working on the levee as a longshoreman, discharging and loading cargo. I was working then for Mr. Mahoney, Mr. Kent and a man by the name of Taylor. I remember the fire at Westwego. The day of the fire I was working at Westwego on the steamship Malabar as longshoreman under Mr. Kent. I was working in the hold at No. 3 hatch. Oil cake was being taken in at No. 3 hatch. I had occasion to go on deck that day. I came up on the deck and was sitting and talking to the mate of the ship. That must have been after eleven; between eleven and twelve. We knocked off for some cause or other, I disremember which, and I came up on deck and talked to the mate until we went to lunch at twelve o'clock. There was a railroad track on the wharf between the shed and the river. There was one that I know of. I could see that track when I was on the deck of the Malabar, talking to the mate, from where I was sitting I could see the track and the wharf.

Q. Do you recall any incident or fact that happened there on that wharf on the day of the fire?

130 A. The only thing I know was a locomotive on the wharf; on the track between the shed and the river; the track that I just spoke of. I remember seeing that locomotive. It must have

been between eleven and twelve o'clock, while I was sitting on the deck, sitting talking with the mate. I am positive of that. I saw that locomotive, just a little past No. 3 hatch. I went to lunch that day over to Gassenberger's bar-room.

Q. What was the engine on that day doing on the track?

A. Set some cars up there. I have seen an engine on that track before. I could not fix no particular time, but I had occasion to be over there a nu nber of times, and generally used to see them. I have no interest in this litigation, one way or the other.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

I am not working for Mr. Lincoln, now. I had been working for him several days on the Malabar. I was working down in the hold. I had knocked off, for some cause, that day.

Q. Didn't you know you had run out of oil cake?

A. Well, that I couldn't say. The foreman generally knocks us off, but he never tells us what we are knocked off for. The only time we know is when the fall stops, and we know we are knocked off, but we don't know what it is for. Sometimes there is something on the wharf, and they will stop us for half an hour or so.

Q. You stopped that day about 11 o'clock, didn't you?

A. Must have been in the neighborhood of 11 o'clock, I think, because we lost one-half an hour. I came back again after I had had lunch.

Q. How soon after you came on deck did you go to Gassenberger's?

131 A. I waited until they sang out we could go for dinner. That was 12 o'clock. I didn't leave there until 12 o'clock. I didn't pay any attention, when I left, whether the engine was there or not. Going to lunch I came down the ladder, down on to the wharf at the lower end of the cotton wharf. I don't know whether I noticed the engine or not. I didn't notice the engine when I went to dinner. I went to dinner about 12 o'clock. Some of the other men went to dinner at that time and some didn't. Some bring their lunch with them. Some of the others were going to dinner. I don't remember who. I went down to the end of the conveyor, the elevator conveyor, and across. I don't know whether the engine was there when I went to dinner. It was about half an hour before that that I had seen the engine there. The engine came in about half an hour before that; she came in, got the cars and pushed them up, then went off again. I didn't see her steaming there. I got back from dinner about a quarter to one. I came right to the wharf so that I would be ready to go to work when the clock struck. I worked on that day until about 5.30, then we quit work; but there was a couple of men kept there to put the trucks aboard the ship, and I was one of them that was kept there until 6 o'clock. I was there until 6 o'clock. Then we finished, put on our clothes, went to the ferry-boat and crossed the river. I first heard that there was a fire at Westwego when I got out of my car at the house. I seen

them standing in the street. I can't say just what time that was. I live a good ways from the ferry where I crossed. Two miles, it might be; might be two miles and a half. I was eating my supper and heard Westwego was on fire, and a fellow came in and said let her burn. That's the first I heard of it. I didn't see no fire while I was there, or while I was on the ferry.

132 JOHN NIE, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I live in New Orleans. I am thirty-three years old. I am a laborer; longshoreman. I was a longshoreman in 1894. In 1893 and 1894 I was working with the firm of Chas. K. Lincoln & Co. I had occasion to go to Westwego in 1894 very often. I was over there the day the fire occurred, but the exact date I don't know. I was putting oil cake into the steamship Malabar that day. That was one of Mr. Lincoln's boats. Ellis, Stych and two of the Reinhards, John and William Reinhard, and lots more men were there with me, but I don't remember all of their names, now. Mr. Lincoln and Mr. Kent were there that day. Mr. Kent was the foreman over there on the day of the fire. I was what they call a "derricksman," a man that takes the fall in and out to haul the cargo into the ship. I stood at No. 3 hatch. I was by the upper end of the wharf. We had a platform built from the hatch to the wharf; that is, we had planks or a stage of some kind, running in and out, and I would take the slack of the rope and put it on the fall of the ship, and take the fall back for another load. I was on the deck of the ship and on the wharf, back and forth. I didn't go into the hold of the ship. I was continually in sight of the wharf. The freight on the wharf at that time was principally cotton. There was cotton piled in the sheds, and all around. The place was literally blocked with cotton. There is a railroad track running along the wharf. I guess it must be about ten feet or so—ten or fifteen feet—from the edge of the wharf where the ship lies. I am speaking now of what existed on that wharf the day of the fire. I don't remember how many ships were loading there on that day. There was another ship there, but I didn't notice enough to be positive. I couldn't say how many were
133 there. The other ship was above the Malabar. I can't say how many cotton berths there are there. I think there were about four lengths of ship, three or four lengths above the elevator. Of course, there is a length at the elevator. About three or four berths outside of the berth at the elevator. There is a berth down below, where there is nothing but grain handled. These ships are all sizes; some 260, 300, 310, 350, 400, 460 feet; and, of course, if two ships of four hundred and sixty feet long come there, of course there wouldn't be room for four like them.

Q. Was any particular incident that happened on that day fixed in your mind by the occurrence of that fire?

A. Yes, about noontime. I don't know as it was exactly twelve,

but anyway, somewhere near twelve o'clock, a locomotive came on the wharf, and she passed up by No. 3 hatch. About how far up she did go, I don't know, but she passed the hatch where I was working; she passed right in front of the hatch. The distance may be ten feet, or it may be fifteen, or twelve, something like that. I don't know exactly the measurements, but I couldn't help noticing it, because we stopped work when the locomotive came up. The trucks couldn't get in. I went off to dinner, and when I came back she had gone. How long she stayed, I don't know. I am positive that that engine was there that day. She had some cars with her, and she passed on by the No. 3 hatch. I am sure of that. The engine itself passed there.

Q. How near where that engine passed was there cotton piled on the wharf?

A. Well, there was cotton piled all around.

Q. What would you say was the closest distance to that engine, or how close to that engine?

A. About fifteen feet; something like that. It was cotton headed up on the wharf. I saw that engine on the wharf before; saw it coming there other times. They came to pull cars in, and they often came in there. I could not call the day. I will say, though,
131 that it has been on there before this day; on the wharf; on the front of the dock. The Malabar that day was lying at the first berth above the grain wharf. There couldn't be any other ship below the Malabar unless she was loading grain. There was no boat taking cargo below the Malabar, that I can remember. I have no interest in this litigation, one way or the other.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

We were loading oil cake and different cargoes on the Malabar. We put on oil cake, meal, staves and one thing and another. That day we were loading oil cake and meal, I think. The oil cake was unloaded on the open part of the wharf, outside of the sheds; some of it was got from a point between this railroad track and the front of the wharf, and some of it came from the other side of the track.

Q. Then there was some space between the track and the cotton which was piled in the shed, wasn't there?

A. Well, you have got a little opening in it. The oil cake was piled in that opening.

Q. Was there any space between the track and the cotton on the shed side of the wharf?

A. No. There was cotton piled in the shed, and headed on the outside of the wharf, between the track and the shed. I don't know how many days the Malabar had been there. I guess she had been there a couple of days. I don't say we had been loading oil cake all the time, but it was one or the other. We were putting something in there. I was what they call "derricksman." All ships have derricks, and they had a derrick on this ship. I was not running the derrick. I was running the rope to hoist the cargo in with. There

is a rope that runs from the derrick down to the hold, up and onto the wharf, and I run with that rope, attach it to the cargo down on the wharf, and then the man who is running the winch, he
135 had it hoisted up. The derrick is a stick of wood that sticks up; the rope of the derrick hauls the freight in from the wharf which was put in the hold of the ship. The winch is the steam hoist machine that works this rope, and my duties was to carry this here rope attached to this winch from the hatch to the wharf, and to fasten it to a load and go back into the ship. The man in the hold unhooked it and I carried it out to the wharf again, for another load. I was on the deck and wharf all the time. We got some of this oil cake off the wharf. In fact, we got it all off the wharf, because the railroad men threw it out of the cars. I was working at No. 3 hatch. The first hatch, counting from the forward end of the ship, is No. 1, the second is No. 2, and the third No. 3 hatch, right after the engine-room; that is, in this particular ship. I was toward the stern. It was not the last hatch. There was another hatch after that; No. 4 hatch.

Q. Now, this steamship Malabar, was she lying right close alongside of the wharf, or was she lying diagonally with her nose to the wharf?

A. Her bow was a little closer in than the stern, but there wasn't a great deal of difference. She was lying diagonally from the wharf, down toward the grain elevator. I don't remember about what stage of water there was.

Q. Don't remember having any trouble over there with ships, do you?

A. We had trouble; yes, sir. I had to carry thirty-foot wharf planks about a mile and a half. We got them away on the upper end of the shed; on the outside. You see, on the upper end of the wharf is a track on the wharf. There is one behind the wharf too, and we got these planks off a flat car at the upper end of the shed. That is, the opposite end from which we were working. We had to go up the wharf. Then we had to go back and get on this here track and get these planks off this gondola car. I don't remember how near finished loading the ship was. I remember that on this
136 particular day an engine pushed some cars in there. I don't remember how many cars; I didn't keep any account of them. There was oil cake in some of the cars. All our oil cake came out of cars. I don't remember whether, out of those cars that were pushed in, we got any more oil cake for loading. I know we got cake in cars that day, but if it was that lot that was on the wharf about that time, I don't know. I was working only at hatch No. 3. There were a number of men in the forward part of the ship, but I don't know what they were putting in. I don't remember how many cars were pushed in. That was not the only time an engine came in while I was working there. I have seen them often. She had been there the day before. Came in with cars the day before. This switch on the front of the wharf ran on down past the grain elevator. It goes on down toward the levee, and connects with other switches. It is where they put cars in on the wharf for unloading.

The cotton that was nearest to this engine was headed up. There was some cotton headed between the ship and the track, and some headed on the other side. The nearest to the engine was about fifteen feet, either way. They left a gangway so box cars can go through the cotton, and, of course, space enough for the men to walk in between the cars and the cotton that was headed. There was space enough to walk between the cotton and the cars. There was space enough to unload oil cake and meal and freight there.

Q. So that about that distance from the engine to the cotton——

A. You don't seem to understand what I am talking about.

Q. I am trying to get you to explain what you are talking about.

A. There is a car on the wharf. They got a whole pile of cotton in one place along here, put up against the track, and then alongside of that they can berth the steamer, and still that cotton be alongside the track.

Q. I understand that, but I am asking you about the distance this cotton was from the engine. I understood you to say it was
137 about fifteen feet. Am I right about that?

A. Between ten and fifteen; might be ten, might be twelve. This engine came on there about twelve o'clock. Pushed a lot of cars up and then stopped there. I went to dinner at twelve o'clock; I guess it may have been half past twelve or a quarter to one, something like that, when I got back after dinner; we got back in time to go to work for one o'clock. We worked some that afternoon. I don't remember what time it was they got the cars in; but we generally go to work at one o'clock and work right along to six. You might work half an hour and then stop half an hour, and go to work again for another half hour and stop again, but you will still have to stay there until six o'clock or half past five in the evening, whether you work or not. I staid there until half past five or six o'clock that evening. I don't remember whether it was five or half past five or six. I know I stayed there until late in the evening, until after five. Then I went home. I was living in New Orleans. I never heard about that fire until after getting home. I went downtown because I had some business down that way; and I didn't hear anything about it until I got home again that night. That may have been about ten o'clock that night when I got back from down-town, and they told me Westwego was burning, and I saw the reflection. That is the first I heard of any trouble up there with fire. I couldn't say about how many cars I noticed attached to that engine. I simply noticed the cars moving past there with the engine. It was an every-day occurrence. I couldn't say whether it was ten or fifteen cars that were being pushed up; I don't know whether it was eight or ten cars. There may have been that many; there may have been more. I couldn't say, for I didn't take notice as to how many there were. I don't know whether they reached up to the upper end of the wharf or not; I don't know how far they reached up. After the engine came up, I went off to dinner
138 and left her there. What she done while I was gone over to dinner I don't know.

Q. Before you left for dinner, do you know whether she had come

upon the wharf to take some cars out, and came back with another string of cars; do you remember anything about that?

A. I don't remember. I know that just previous to dinner time she came up on the wharf and stopped at hatch No. 3, went up the wharf further; and during that time it came twelve o'clock, and I went off to dinner. When I went to dinner she was pulling somewhere up on the wharf; she was moving up there. The Malabar was lying like all ships, with the bow upstream.

JOHN STYTCH, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I live in New Orleans; I work on the levee as "longshoreman;" I have been in that business ten years; I am forty-four years old. I have worked under Charles K. Lincoln. He is a stevedore. In 1894, at the time of the fire at Westwego, I was working with Mr. George Kent. I was working at Westwego on the day of the fire. I was tending the fall at the winch, fixing the rope that leads from the derrick that takes a turn around, and take it in. I was on the deck of the steamship Malabar, at No. 3 hatch. Oil cake was being loaded on that vessel at that time at that hatch. From my position on the deck I could see the wharf; I could see it plain. Cotton and oil cake was mostly on the wharf at that time. At our end of the wharf was cotton, except the oil cake we were taking in. I couldn't tell how much cotton was there. The whole place was full of cotton. It was all blockaded up with cotton. I forget how many railroad tracks there were on the wharf. I think there was a switch
139 up somewhere above, where there were some planks laying; some kind of a switch, I think, going off there on the river side of the dock. There was one track between the cotton shed and the river. That's all I saw, to the best of my memory. I remember when the fire occurred.

Q. Do you remember any particular incident that happened that day at Westwego before the fire?

A. No, not that I know of, except I seen the engine on the wharf; seen the locomotive and cars. I saw them right abreast of the No. 3 hatch, where I was working. When I saw the engine she was right abreast of No. 3 hatch. I am positive about that. I am positive that that was on the day of the fire. It must have been somewhere between eleven and twelve o'clock; somewhere in that neighborhood. I don't know how long that engine stayed on that wharf. She was a good while there. I couldn't exactly say, because I had to attend to my work; I had to mind my work. I know it was a good while, anyhow. I couldn't say exactly how long she was up there, but she was on the wharf somewhere between eleven and twelve o'clock, right abreast of No. 3 hatch. I have no interest in this litigation on one side or the other.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

I was running the falls on the winch; take a turn of the rope around the barrel of the winch taking in cargo. That kept me on the deck of the ship. This winch is right by No. 3 hatch; right behind it. So as to be out of the way of the cargo coming into the hatch. My work at this hatch kept me pretty busy there while men were taking in the cargo. We were busy taking in the cargo on the Malabar that afternoon. We took in all the oil cake we had, and knocked off about half past eleven, waiting for the cars to come in.

Eleven o'clock, I think it was, we knocked off. Then some more oil cake came in; came in in cars. We were knocked off before this engine came in there.

Q. And these cars were to bring the oil cake in for you to continue to load?

A. No, we were working when the engine came on the wharf. We didn't have no oil cake, only a few loads, and had to wait until they came in. We had about four or five loads and we had to wait for the other. Had to wait for some more oil cake. We stopped working, then, until they would unload some more cars. They were unloading it for us to put on the ship, and we were waiting. This engine, I understood, was bringing in this oil cake. There was a good many cars with her; I don't know exactly how many there was. I couldn't say for sure. I couldn't say how far up on the wharf they reached. The engine was right abreast of No. 3 hatch. The cars were ahead of the locomotive. Up the wharf. The engine was headed up the wharf, and was pushing the cars up. I couldn't say how long the engine stayed there. We worked up to, I think, eleven or half past eleven; and we stopped, I think, it was about half past eleven. I went to dinner about twenty minutes to twelve; I went over and got some lunch. The engine was there when I got back; I only got a sandwich and came right back. When I got back it must have been five or ten minutes to twelve. I couldn't say how long she stayed; I went away from there. She was standing still there. I couldn't say whether she was standing still all the time after she brought the cars in. I went away up to the top end of the shed. I guess I was up there about ten minutes. I didn't see her when I got back. The cars were there. The men were unloading the oil cake. They were not unloading the oil cake right at No. 3 hatch, a little above it; about twenty feet, I think it was, from the hatch. I remember testifying in a suit in New Orleans, in the Allgeyer case.

Q. Do you remember this testimony that you gave in that case:

—. "How many cars did she have with her? A. I don't know, I didn't count them; I can't say exactly. There were a great many cars. The cars reached from the after part of the ship to about the bow of her.

"Q. There were very many? A. Yes, sir; very many cars."

Q. You remember that testimony of yours on that trial?

A. Well, it might have reached that far; I couldn't say that.

Q. I ask you do you remember testifying to that effect on that trial, those questions and those answers.

A. I forget now. I know there was a great many cars, but how many, I don't know exactly.

Q. Did you so testify on that trial?

A. Yes, sir; that there were cars?

Q. Do you remember this testimony of yours on that trial?

"Q. What time of day was it when you saw that engine? A. It must have been somewhere around eleven or twelve o'clock. I don't know particularly, but it must have been about eleven or twelve o'clock. I had no watch, but I know we knocked off for dinner."

Q. Do you remember that?

A. Yes, sir.

Q. Did you so testify?

A. Yes, sir.

Q. Do you remember this testimony:

"Q. Did you see the engine as far as it went? A. I only saw it going toward that No. 3 hatch.

"Q. Where did she stay? A. She stayed there.

"Q. Didn't she go in higher? A. No, sir; she stopped there.

"Q. Didn't she go back? A. Well, I was at dinner; I didn't see."

Q. Do you remember that testimony, and did you so testify?

A. Yes, sir.

Q. Now, you say you went to lunch?

142 A. Well, it was a sand'wich; I went over to lunch; it was only to bite a sandwich.

Q. You went there about half past eleven, you say now?

A. It may have been; maybe later.

Q. Well, your recollection is not very distinct about what occurred on that day, Mr. Stych, really?

A. Sir?

Q. Your recollection is not so distinct as to what occurred on that day?

A. Well, I don't know; I just tell the truth that I saw.

Q. I have no doubt you are teiling the truth, but your recollection is not so distinct about it. There was nothing distinguishing that day from any other day, was there, particularly?

A. Nothing I know of, except the engine and the cars; that's all I know of.

Q. Except the engine and the cars? Well, didn't they ever push any cars in there before?

A. I couldn't say. I hadn't been working there in a long time before that. I never saw them push cars in there before this day to my recollection. I wasn't working a good while until I went to work on the steamship Malabar. I was working on the Malabar all the time she was loading oil cake there. We knocked off work at six o'clock and went across on the ferry. I first heard of the fire the next morning. I heard it at Southport; I was up at Southport next day.

Q. Do you remember this testimony of yours in the Allgeyer case, here in New Orleans:

"Q. When did you leave that evening? A. We knocked off at half past five; it may have been a quarter to six when we left there.

"Q. Where did you go? A. Came right across the river on the ferry.

"Q. To Tchoupitoulas street? A. Yes, sir.

"Q. Did you go back there that evening? A. No, sir; I never went back any more. Went down in the car.

"Q. You didn't see the fire? A. No, sir; only when running across I saw the smoke, but we couldn't tell where the fire was.

143 "Q. Did you see the smoke of the fire before you reached your home? A. Yes, sir; I saw some kind of a smoke, but I didn't know what it was."

Q. Do you remember that testimony?

A. Yes, sir; I testified that way.

Q. Now, where was it you saw this smoke?

A. I was going down in the Tchoupitoulas Street car, and saw the smoke in that direction; that is what I referred to.

JOHN REINHARD, called as a witness for plaintiffs, testified as follows (this testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I live in New Orleans and am a longshoreman; a laborer. I am forty-three years old. I have been engaged as a longshoreman about twelve years. I work for anybody that gives me a job. I work for Elder, Dempster & Company, one time; another time, the West India Steamship Co.; another time, for Mr. Lincoln, stevedore; and I work for Mr. Kent. He is the foreman, and Mahoney, who has given me a job of work; shovel grain, or do any work like that. In 1894, at the time of the fire at Westwego, I was employed by Mr. Kent. He is the foreman for Mr. Lincoln. I was working in the hold of the Malabar. She was lying at the cotton wharf, right above the grain elevator; in the middle of the wharf at Westwego. She was at the lower end of the cotton wharf. I was working in the hold at number 3 hatch. I had occasion to be on the wharf that day at dinner time. I seen a locomotive on the wharf, right abreast of No. 3 hatch. The track is between the cotton shed and the river. That is the only track that was on the wharf at that time.

Q. What time of day was it that you saw the engine on that wharf?

A. I came out of the hold about quarter to twelve. The 144 men knock off at half past eleven, or something like that; we had a little extra work to do, because we were the storers; storing oil cake. I came out about quarter to twelve. When I came out I seen a locomotive on the wharf. I am positive I saw it there on that day. I cannot tell how long the engine stayed there.

I went over and got dinner, and I did not come back there until nearly ten minutes to one. I have no interest in this litigation.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

From my recollection I had been working up there on the Malabar, I think, about three days, if I am not mistaken: it might be more. Loading oil cake all the time. I was in the hold up to dinner time, around a quarter to twelve, then I would knock off and go to dinner.

Q. And do you remember stopping that day on account of there not being oil cake to load in this hatch?

A. I could not answer that question at all; I know the hatch was k ocked off.

Q. Well, do you remember stopping early that day for any cause?

A. Well, now, I could not tell you that, sir. I don't remember that, at all; that is not in my recollection. All I know, it was a quarter to twelve when I came out of the hold to go and get dinner. And the engine was standing on the wharf, right at the cotton shed. She wasn't puffing at the time I went past, because I went ahead of her. She wasn't moving at the time. I don't know how many cars were behind her: I took no notice; I went right over to the bar-room and got my dinner.

Q. Well, when you passed that engine, did you notice how many cars there were?

A. I had to go around this way; the engine was standing here, and the cars were in front, and the engine was towards down-
145 town. I had to pass that engine, going towards my dinner place. I had to go downtown on that wharf to get dinner. That is, I went down towards the grain elevator, in that direction, but I didn't go to the grain elevator, and then went over the wharf to the bar-room to get my lunch. I remember passing this engine; I had never passed it before going over that wharf, as I know of. I seen engines on the wharf over there; you know I have been working over there for years. At other times I saw an engine on the wharf pushing cars in to be unloaded on this track that was on the front of the wharf. At about ten minutes to one I was coming back. I didn't notice whether there was an engine there; I could not tell whether she was there when I got back or not. There was cars on the track at the upper end; the middle of the ship. About the middle of the ship; about the centre—very near on the No. 3 hatch. This No. 3 hatch was right even with the cotton shed—the lower end of the cotton shed downtown. No. 3 hatch was right even with the lower end of the shed—outside here was all piled up with cotton. There was no shed there at all, as this cotton was piled upon the outside. The shed did not reach out to the outer edge. This No. 3 hatch was right even with the cotton wharf—right even with the lower end of the cotton wharf.

Q. And the engine was right at the lower end of the cotton wharf?

A. No, sir; not that way. I beg pardon. You know this cotton wharf runs down all the way down, too—runs the whole distance. It is the cotton wharf, all the way down. There is cotton all piled up here, and an opening where there is water.

Q. I want to know how far from the lower end of the cotton wharf No. 3 hatch was?

A. It was right even with the cotton wharf—even with the lower end of the shed on the wharf. The wharf runs down to No. 4 hatch, and further than No. 4 hatch. The shed, where the cotton was piled, was even with No. 3 hatch. I worked that afternoon.

146 Q. Do you know whether you took any oil cake that came off the cars that were there?

A. Must have taken oil cake off of the cars, because that is the way we get the oil cake—get it from the cars. There was a little more oil cake that was on there, but we knocked off and gave the men a chance to wash down in the hold at one o'clock. We finished that afternoon. We took in a considerable amount that afternoon in No. 3 hatch. To my recollection, we quit work that afternoon at half past five o'clock—somewheres around there. I don't remember what time I left the wharf that afternoon—between half past five and six, as far as my recollection goes, that is what time it was. I didn't see anything of any fire while I were there. I never heard nothing of any fire until the next morning.

WILLIAM REINHARD, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

In November, 1894, I was working under Mr. Kent in loading the Malabar at Westwego. First I was working on the Malabar at Southport, putting in cake and meal. After that, about eleven o'clock, I came over to Westwego, and the Harrison boat was in the road and we had no room to work there, so we had to wait until the next morning, and came over the next morning and started to rig her up. At Westwego we loaded the Malabar with cake. We got that cake on the wharf. It was not unloaded from the cars. We first took the cake into the vessel that was unloaded on the dock. First we rigged her up. Mr. Kent told us to go and hunt some planks; the ship was off the wharf a little piece, about 20 or 22 feet, and so we had to go and get long planks, and when he asked us to go and hunt up planks we couldn't find a plank long enough to reach over from the wharf to the ship, so we had to go and look around for some other planks to rig up, and the mate told me there was some planks up at

147 the upper end of the wharf; so we went up there to get the planks; they were on a car. We took one of them and managed to get it through an alley on the upper end. We tried that alley up there first, and when we got out there there was a lot

of cotton piled there, and so we had to shove the plank over and through there; and when we got down near our ship the whole place was piled so close that the four men could not get through, so we had to shove it over the oil cake and managed to get it over that way; took it out right in the middle where our ship was lying. There was an open space there between the sheds that was right opposite our number 3 hatch, where we came out through that place. That was the biggest gangway; I think there was three altogether, one in the centre, one at the upper end and one at this end; and we managed to get the plank through there. The plank was pretty heavy, so we asked Mr. Kent to give us some more men. After we got it around, got the plank around, everything was piled so close there that we had to shove it over, had to push it in the gangway. The cotton was piled so close to the gangway.

Q. Well, now, will you describe generally the condition of those sheds as to being filled with cotton. Tell me how full they were of cotton.

A. Well, underneath the shed I think it was about seven or eight high.

Q. And how were those gangways, wide or narrow?

A. There was one gangway you couldn't get through. There was only one gangway we could get through, carrying the plank on our shoulders, and that was at the upper end, and that is the reason we preferred to take that one.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

148 These planks were pretty heavy pieces of timber, pretty heavy planks; cypress planks; about 35 feet long and about a foot wide and about an inch and a half thick. They were pretty heavy.

Q. Now, there were four of you; how did you carry them?

A. When we first carried it we had to carry it on the edge. That's the only way we could get through the gangway. Carried it on the shoulder; up towards the end, on our shoulder.

Q. Were you carrying it, two in front and two behind?

A. No, sir; four in a row; one went behind the other.

Q. One went a little behind you, on the opposite side, and the one on the same end of the plank with you, you would have your right shoulder under it and he would have his left shoulder under it?

A. No, sir; couldn't get through the gangway; wasn't wide enough.

Q. That was the upper gangway?

A. No, sir; the lower gangway. When we came out to the track to the front of the shed the car was in the way and we had to push it through. We had to push it up, over the freight. We carried the first plank through the upper gangway, in the same way, except that instead of letting it lie down flat we set it on its edge.

Q. And the difficulty you had in getting out was in the turn

opposite the Harrison steamship, not in bringing it down the wharf?

A. The Harrison boat, and getting it over the cotton which was outside of the track at that point.

Q. Then the next one you brought down on the woods side on the wharf, right next to the cake, until you got it where this gangway ran across the wharf?

A. Opposite our number 3 hatch. And we came right through there with it on our shoulders.

149 CHARLES K. LINCOLN, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in this cause):

Direct examination by Mr. CLEVELAND:

I reside in the city of New Orleans, and have resided here 32 years. I was a stevedore. I have followed that business 31 years. I was engaged in that business during November, 1894. I am somewhat familiar with the place called Westwego. I can't remember all that I was doing on the 12th day of November, 1894. I was engaged in loading a vessel, as stevedore, under the employment of Ross, Howe & Morrow. That vessel was the Malabar, lying at Westwego. I don't remember what others were there. I was at Westwego on November 12, 1894. I guess I got there somewhere between ten and eleven o'clock, but I can't remember exactly. The Malabar was loading with oil cake at the Westwego wharf. My foreman at that time was George H. Kent, and he was loading the Malabar.

Q. Will you give me a general description of the dock at Westwego as it existed on November 12, 1894—I mean the structure?

A. Well, the lower part is taken up with the conveyor to the elevator. I can't say the length of it; I wouldn't say the length of the wharf or the width, but there was room for about three ships above that, I should say. Railroad tracks in the front and rear and sheds on the wharves; two sheds.

Q. Describe, if you please, the character of these sheds or structures that were upon the dock.

A. Well, they were built on posts. It's merely a cover. Posts and a roof, that is all they consist of. I don't think they were enclosed on any side. I had occasion on my visit to Westwego on November 12, 1894, to notice the contents of those sheds. They were blocked up almost completely with cotton. The cotton in them was piled up in piles. That is, the cotton is laid down, one
150 bale on top of the other, piled right up seven or eight or nine tiers high. It's pretty hard to say how high the sheds were; perhaps 20 or 25 feet; I can't remember all this, as I never took notice particularly of the dimensions, height or anything like that.

Q. Will you describe, if you please, a little more fully how this cotton was stowed on this wharf under and about the sheds?

A. Well, as I said before, it was piled perhaps seven or eight or nine tiers high and it extended under the roof out very near the railroad track. The bottom tier of this cotton came near enough to

the railroad track that I was afraid to stand between the tier of cotton and a locomotive; one or two feet. I am speaking now of the material in front of the shed, between the shed and the river. I did not notice whether there was any gangway that ran lengthwise of the sheds. I couldn't say it ran the whole length. There were some gangways; I wouldn't say they ran the whole length of the shed, though. There were some gangways across the sheds. Perhaps some of them might have been two feet, perhaps some of them a little more; barely room for a man to go through. I know there wasn't room to run trucks through. There were not gangways between each row of bales. I couldn't say how many bales in length there were between the gangways; probably six or eight; might have been six or eight tiers of cotton and then a gangway. I can't remember all that. I saw cotton on the dock that was headed. Between the sheds and the front there was cotton headed. I did not see any cotton headed in the sheds. The cotton I saw headed was in front of the wharf. I mean between the track and the front of the wharf. In the open part of the wharf. I have already stated that the cotton came out from under the roof of the shed, came outside of the roof near the railroad track. I saw some of the cotton there outside of the line of the roof toward the railway track, in front of the sheds and near the river, that was covered with tar-
151 paulins. I know there was considerable that wasn't covered; the lot where I was wasn't covered I know.

Q. What else was under the sheds, if anything, except cotton?

A. I think I saw some oil cake under the shed in some places.

The Malabar was loading at the lower end of the dock. There were one or two other ships loading there besides the Malabar on the 12th of November, I won't be sure which, at the upper end of the wharf. I am sure of one. I had no part in the loading of these boats. My duties were confined exclusively to loading the Malabar. The other boats were taking in cotton. I didn't make any particular examination of this cotton as it was stowed there under the sheds. I was up and down the wharf considerable. My business called me there, and I was up and down there a number of times. I didn't make any estimate at all of the number of bales that were under the sheds, or either of them. I don't remember how long my ship lay there at the dock. I don't remember when she commenced to load. I suppose I was there on November 12th a couple of hours. I did not notice what was being done in the rear of the sheds. I have seen the fire apparatus. I did not take any particular notice of it on that day.

Q. What is Westwego; is there a town there?

A. Well, no, no town. The nearest house to the dock outside of the elevator is a thousand or fifteen hundred feet, I should say, from the wharf toward the upper part.

Q. How do you reach Westwego from New Orleans?

A. There is a ferry running across the upper part of the city just above Audobon park. The ferry landing is very nearly a quarter of a mile from the dock at Westwego; the elevator was situated toward the lower part of the wharf right abreast of the lower part of

the wharf in the rear. This conveyor that I spoke of extends up on the lower part of the wharf from the elevator out to the end of the wharf and then up the wharf.

152 I said that there was not room between the cotton that was in front of the sheds and the railroad track for me to stand there.

Q. How do you know that?

A. I have stood there and a locomotive came along. I did not remain there. I got on top of the cotton to let the locomotive pass me. This was right abreast of the Malabar, opposite the upper shed, I think it was where she lay. There were two sheds on this dock. I think it must have been the lower shed the Malabar lay abreast of, but I wouldn't be positive whether it was the upper or lower end where the Malabar lay abreast of.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

Q. Mr. Lincoln, you speak of a lower and upper shed. Would you designate by the one nearest the elevator which you mean by the lower shed?

A. That would be the lower shed, and the one furthest from the elevator would be the upper shed. The elevator don't form part of the wharf; just the conveyor. I couldn't say how far it is from the elevator to the wharf, but it's four or five hundred feet, I should judge, or more. The elevator stands back some distance from the levee and the wharf.

Q. And the sole connection between the elevator and the wharf are the tracks which run between the elevator and the wharf. Is that not the case? Some switches that run from there to the wharf; they run between the elevator and the wharf?

A. Yes, sir; run in between them—the tracks run between the elevator and the wharf. The conveyor of which I speak is a conveyor to carry wheat out from this elevator to the point where ships can come and receive it from the conveyor. The conveyor runs on the wharf from the elevator, crosses from the elevator and runs up the wharf. The conveyor is built from the elevator to the wharf and then up the wharf. That is my recollection of it.

153 Q. And really, then, as you remember it, it formed a part of the wharf; that is, the conveyor?

A. Yes, sir; built on the wharf; the conveyor; yes, sir; so that a vessel loading at the conveyor would be simply a little further down than a vessel loading at the lower shed. The conveyor does not run away up where the cotton was. It runs up to below where the shed is, the lower shed which I speak of. If there was a vessel loading wheat, a vessel loading cotton at the lower shed, and a vessel loading cotton at the upper shed, they would lay in a row, one behind the other; one lower down than the other. I speak of the side next to the ships, where the ships come to, as being the front of the wharf.

Q. About how wide is it from the front of the wharf to where you say the two tracks were?

A. Well, I should say twenty feet; perhaps twenty-five feet; something like that. It was planked, they are not open there; it's all solid work; all covered, but with an opening abreast of the ship. It's not roofed, not roofed at all. These tracks which I speak of as being there, were on the same level as the wharf. There were two running side by side, right parallel with each other. I should say the inside of the track nearest the sheds are ten or fifteen feet from the line of the roof of the sheds, as near as I can remember. I know of the tracks on the other side of the shed being there. I know cars were discharged there, and they were down below the level of the wharf. They were down below the level of the wharf six or seven feet, so as to make the car door level with the wharf. Maybe they were not below that much. I don't know how many tracks there were. As near as I remember, I think these sheds were 20 or 25 feet high at the centre; that is a kind of sloping shed; it wasn't a sharp pitch. I should say they were, perhaps, about 15 feet at the outer edge, as near as I can remember. It's pretty hard for me to remember all these different things. I went up there that
154 day about 10 o'clock, as near as I can remember; I was up there about two hours. I was interested in loading cotton meal. The principal part of this cotton cake or cotton meal was stored on the dock; was abreast of the ship, and there was some under the sheds, if I remember right. By abreast of the ship I mean out in this open space. I know the cargo came out of the cars and was piled there abreast of the ship. I don't remember whether my ship was at the upper end of the lower shed or the lower end of the upper shed. I don't remember exactly; it was about the lower part; must have been the upper part of the lower shed, but I won't be sure of that; pretty near the middle of the cotton wharf. The other ship that was there was at the upper end, close alongside the wharf, immediately in front of me. I am not altogether positive with what that other vessel was loading. I know she wasn't taking on cotton that day. I stated that I thought there were one or two other ships there; I will say one or two, but I am sure of one; the other was still further up, at the extreme upper end. I should say that my best recollection is that there were two, but I won't be sure. There was no vessel at the conveyor. I left there, I guess, between twelve and one; I stayed there about two hours, I suppose. I did not come back that day. I cannot say what time it was that I heard or saw an engine coming; I should imagine about between eleven and half past eleven; along about eleven o'clock, I should say.

Q. It was down at your end of the wharf where the steamer Malabar was loading?

A. Backed the train up the length of the wharf; went up and backed down again. I couldn't say whether the cars were loaded or unloaded. I don't know how far up they went, but they went past the Malabar. I don't know how many cars there were. It went up and in five minutes or so came down again. If I remember

right, they were switching cars when I left. I think they
155 ran some cars up, backed down and switched on the other track, but I am not sure. As near as I can remember they switched these cars from one of the tracks in front of the wharf onto the other, and left some of them there. I don't remember whether the engine was on the wharf when I left or not. Of course, at the time I didn't attach enough importance to it to even remember. This cotton which was headed up that I speak of was between the tracks and the river front, on the wharf, just above the Malabar and towards the other vessel. The cotton-seed meal was lying, perhaps, abreast of where the Malabar was; I think there was some in the shed above there. By cotton headed I mean simply bales standing on end. Generally store it end up and as straight as you can.

Q. This cotton which was headed consisted of but one line of bales and had no bales piled on top?

A. No; just bales headed up; one thickness, the length of the bale. I think there were two tracks between the shed and the outer edge of the wharf or dock. In the rear there is one track, I know, goes right alongside of the wharf to discharge cargoes from the cars to the wharf.

Plaintiffs' counsel reads from the deposition, as follows:

Redirect examination by Mr. CLEVELAND:

Both sheds were piled with cotton, piled as I have described.

Q. Did you go through either shed?

A. Yes. I could not see from one gangway into another.

Q. As you walked through a gangway describe how the cotton was piled?

A. The cotton would be perhaps seven or eight tiers, according to the size of it, seven or eight tiers high. By cotton piled I mean one tier laid down flat, another put right on top, and another one on top of that; piled right up like a stairway. We took some of the cotton meal or oil cake which was loaded on the Malabar
156 from cars; considerable, I think. That's the way it was brought, and they delivered it in the ship that way.

Q. How was the oil cake taken from the cars to the ship?

A. Well, the railroad company put it out; they had it brought to the wharf and put it out of the cars and piled up, and then the mate of the ship goes and counts the piles. I don't know how much of this oil cake that I loaded on the Malabar was under the shed. Mr. Kent had charge for me of loading the Malabar.

Q. Is cotton that is awaiting transportation from New Orleans usually piled or headed?

A. Well, it all depends upon the space in front that you have. Oftentimes it is put out on the wharf and some of it is piled on the dirt.

Q. Anything ever call your particular attention to the condition of the cotton at Westwego on November 12, 1894, and if so, what was it?

A. I had to get a stage plank from the rear of the shed to the ship, or my foreman did, and he called my attention to the crowded condition of the wharf and to the chance he had to get the plank through to the ship.

Q. So you saw the crowded condition of the wharf?

A. I mean under the shed.

Defendant's counsel reads from the deposition as follows:

Recross-examination by Mr. TAGGART:

I think the gangways which ran across the wharf ran clear through. There was nothing in any particular gangway running across the wharf to prevent my seeing across. I could see through them.

Q. What you meant, then, in answer to Mr. Cleveland's question, was that you couldn't see from one gangway to the other?

A. No, sir; because they were piled higher than a man's head.

Q. When you say this cotton was stepped up, you mean that the lower bale was laid out closer to the track than the bale above it?

A. Than the next bale on top; about half a bale. Each
157 one receded back about half its width. The bales lay lengthwise, parallel with the track and with the ship. The next bale would be laid half a bale further back. Like a bricklayer laying a wall. And the lengths would be end to end as they lay there on the wharf close together.

Plaintiffs' counsel reads from the deposition as follows:

Redirect examination by Mr. CLEVELAND:

Q. Do I understand you that between the outer line of the shed; that is, between the line of the roof of the shed and the inner line of the track, which was between the shed and the outer edge of the wharf, cotton was piled as you have stated?

A. From near the edge of the track, up near the edge, and it extended beyond the line of the roof as I have stated.

GEORGE H. KENT, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

My business is stevedore foreman on the levee. I was such in November, 1894. I was engaged in loading the steamship Malabar for Ross, Howe & Morrow, ship agents at Westwego. I was engaged in this business on the day of the fire. I can't remember exactly how many days it was before the fire that I got there on my steamship. I am positive it was more than two days, but how much more I don't remember. During the days that the Malabar was at that dock at Westwego, I was there during the whole of the day. When the Malabar first steamed alongside of the wharf she lay about the centre of the sheds.

Q. Which shed, the upper one or the lower one?

A. The lower one. I can't say how long she lay there, but the captain refused to lay longer on account of having no water.
158 They then shifted him from there down to the grain berth opposite the elevator, and had a towboat to come in and wash out the mud. Took soundings and found the ship was lying aground, and the captain refused to stay any longer, and then had us hauled opposite the elevator and had a towboat come in and wash the mud; and they trucked the oil cake from the upper berth down to the grain wharf, and we stayed down at that wharf until the following day, and on the following day we shifted back to the berth we were in at first and then completed our loading. In the course of my loading at Westwego I had occasion to notice the condition of the sheds on the dock there.

Q. Will you please to describe their condition as to cotton?

A. Well, in all my experience, and I have been foreman on the levee for eighteen years, I never saw a place so jammed in my life; it was just piled almost to the roof, and from one end of the shed to the other, and there was probably three or four gangways, very narrow gangways, left in between the cotton; too narrow to shove a truck through.

Q. What was it called your attention, particularly, to these gangways, if anything?

A. The ship, on account of low water, could not get into the wharf, and I had to get some 30 or 35 foot planks to reach from the cap of the wharf to the rail of the ship. The superintendent told me that at the upper end there was a flat car with some long planks on it, that I might use if I got them. I had occasion to go there and get those planks, and had to carry them through the gangway on their edge, because we couldn't carry them flat. I couldn't get a cotton truck through, because they were not more than two feet wide, and, as I say, I had to edge the planks to get them through. This flat car was on the upper end of the upper shed to the woods. The oil cake was taken from the wharf, between the track and the cap of the wharf, the edge of the river. I mean there was a
159 lot unloaded from cars, and there was a lot that wasn't unloaded because they didn't have room to unload it until I would take the other off the wharf and put it aboard ship, and so, when I got one car on we would then take another. When one car got empty they would take the full cars and unload them. I must have had 25 or 30 men working for the stevedore. I don't know exactly how many. There were brothers named Rheinhard, one named Nie, one named Sykes, one named Ellis and lots of others that I can't remember, all white.

Q. Did you, at the time of this visit to Westwego, take any notice of any of the fire apparatus that was there?

A. No, sir; I couldn't see any of that; I didn't look for that. The floor of this dock was composed of planks of some kind.

Q. Were they close together where you observed them?

A. Well, I noticed one time, in the summer time, when we would be taking a lot of meal aboard the ship, some time previous to this

Malabar affair or this fire, that in sweeping the wharf lots of this meal went through the cracks of the wharf.

Q. How near to the track that ran between the shed and the river did you notice cotton piled on this dock?

A. So close that a man couldn't stand next to the cotton and allow a freight car to pass him.

Q. Did you, on any of your trips, at any time, to Westwego, see any men at or about any of the plugs?

A. I remember distinctly, on one occasion, seeing a man drinking from one, but it was in the summer time and there was nothing at the time under the shed but meal and oil cake.

Q. Did you get any of your cargo for the Malabar from under either of the sheds, do you recollect?

A. No, sir; I won't be positive, but I think we got it all right from the front of the wharf, all of it was loaded right from the front of the wharf. I couldn't say positively how many of these gangways there were in these sheds, although I looked, but to the best of my knowledge, I think there were three through the tiers of cotton from the woods side of the wharf to the river side.

160 Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

I was accustomed to go up there to load ships. I had been loading there since Westwego started, different times. I know I have been there ever since they commenced. And frequently loaded ships there. I have never been engaged in loading cotton, but I have been there loading ships with other cargo, that were taking cotton at the same time. My business was what they call "round cargo." I am not a cotton man. I went up there with this steamer, the Malabar, to load oil cake, and found my oil cake on the front of the wharf. It had been unloaded there from cars which had been brought in. I have very seldom found my oil cake on the front of the wharf; that was about the only time that it was not unloaded under the sheds. It was very frequently unloaded from the cars in the rear, and deposited on the wharf. I had nothing to do with the unloading of the cars. I had a gang of men under me who were employed by the stevedore. I would go up there and take the oil cake or meal or other cargo, wherever I would find it in the shed and take it from there to the vessel, and the railroad employees had nothing to do with loading the ship or assisting me in any way.

Q. All that you had to do when you went up there, was to inquire where the particular cargo was that you were to load?

A. Yes, sir; that's all. To find out from those people where our cargo was situated.

Q. And then you would go to work?

A. And truck it to the ship.

Q. Wherever it might be, on or about these sheds?

A. Yes, sir.

Q. There was no particular place for depositing these cars, was there?

A. Well, there was a rule that the cargo must be delivered
161 within the reach of the ship's tackle; that, I believe, means not further than 75 feet from the ship's side.

Q. But did you find that was always observed up there; did you ever go beyond 75 feet at any time?

A. Within 75 feet from one end of the ship to the other. As long as it was put out abreast of the ship, fore or aft, it was supposed to be within reach of the tackle.

Q. Now, you speak of gangways, three, or thereabouts, being in this lower shed. You were opposite the lower shed when you were loading, were you not?

A. Yes, sir. And these planks that I got, I brought through the gangways in the lower shed, to my ship, and that was all that I had to do with these sheds or any part of this wharf, except the front, where the cotton-seed meal was. I had no connection with the upper shed while I was there; that's the only shed I had any business to go through, at all, was just getting those planks through. The balance of the cargo lay on the face of the wharf.

Plaintiffs' counsel reads from the deposition as follows:

Redirect examination by Mr. CLEVELAND:

Q. You speak of getting through or having these planks carried through a gangway in a shed, was that in the lower shed that you went through or that you carried the planks through, or was that the shed furthest up the river?

A. That was in the shed furthest up the river. I may get mixed up in those sheds. I think there were two on the dock. I won't be positive about the two sheds. I know we got the planks from the upper shed. This flat car, with those planks on her, lay on the upper edge of the wharf, and we had to carry them on down and then bring them through the shed, through a gangway in the shed. On the start the Malabar was lying just about half way between the elevator and the upper part of the wharf, but what shed
162 it was, I don't remember. There was a ship lying ahead of us, loading, one of the Harrison boats, loading cotton there. And we came in astern of her. I am mixed up on those sheds; I don't know exactly whether it was the upper or lower shed; I know we got the planks from the upper shed and brought them through. But whether we brought them through the upper or lower shed I don't recollect.

Q. This crowded condition of the sheds, was the cotton which you saw there piled in both sheds, or only one?

A. The entire wharf.

Q. Did you notice cotton that was piled outside of any shed at all?

A. Yes, sir. By launching the planks. I mean shoving them over the tops of the bales of cotton and piles of oil cake. We got the railroad men to give us a hand at one time to launch those planks over the top of the cargo, to get them into the ship's gangway.

Q. That's when you got them between the track and the river?
A. Yes, sir; bringing them right out to the ship.

Recross-examination by Mr. TAGGART:

Q. Now, Mr. Kent, you referred to these planks, and leaving out of view the designations upper and lower shed, wasn't it the shed opposite your ship through which you brought these planks?
A. Well, we came through a gangway opposite the ship, but we had to carry the planks along the woods side of the shed; there was a gangway. There is where the rear track comes along, and we carried them along there until we came to a gangway we could pass through immediately above our ship, and came through to our ship; we didn't carry the plank to the ship and then down along the wharf. The first plank we got, I sent four men to get it. I didn't go myself. I sent them to where this flat car was at the upper end of the wharf, and when they went to get the other plank I went up there too. They couldn't turn to get it out, and we had to
163 take the end of the plank and launch it over the cotton, and then brought it down until we came to this gangway to get through. That was up at the upper end, almost abreast of the ship, and then we crossed through to the ship.

By Mr. CLEVELAND: These planks were 30 or 35 feet long; they were twelve inches wide and three inches thick.

M. J. SANDERS, recalled as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

Labor troubles existed in October and November, 1894, at New Orleans. The origin of the troubles was an attempt by what is known in New Orleans as the white screwmen to exclude colored screwmen from working at vessels in New Orleans or in the port of New Orleans. The white screwmen took the action of knocking off from all vessels and then deciding that they would not commence work again except with such ship agents as would agree to employ no colored screwmen. One ship agent, I believe, did make some sort of an arrangement with colored screwmen with the intention of doing away with the white screwmen on his vessels, but, owing to certain outrages which were committed upon the men working upon his vessels and upon the crews of his vessels, he gave up the fight. We took it up, and the result was considerable trouble, intimidation, threatening and shooting after we had contracted with the colored screwmen to do our work, and finally our wharf was destroyed by fire on, I believe, November 4th, after which we obtained the protection of the Federal courts and went on with our work peaceably.
There was more or less an unsettled state of affairs and more
164 or less intimidation for, I suppose, three or four months after November 4th. The terminal of the West India Steamship Company was within the city of New Orleans.

Q. Look at the paper which I now show you, which is Plaintiffs' Exhibit No. 36 (printed *post*, at p. 299). I call your attention to the words "delivery unrestricted." Are you familiar with such a form of engagement note or notice?

A. Yes. This is something like the present form, with some slight additions, and, if my memory is correct, is about a copy of what was used in 1894.

Q. Please tell me what, in 1894, among the merchants and shippers entering in New Orleans, the words "delivery unrestricted" meant?

A. This is a peculiar form of delivery which is used only by the Texas and Pacific railway and certain connections of theirs in Texas. The usual form of engagement note calls, as a rule, for a certain date of delivery to the vessel. The Texas and Pacific railroad and certain connections for many years have used the unrestricted term, because they did not desire, as I understand it, to be held to deliver the cotton at any specified date and it has always been understood that the rule must work both ways; in other words, the railroad was not bound to deliver the cotton by any particular date, nor was the steamer obliged to take delivery of the cotton at any particular date. The restriction as to actual time has never been definitely settled; it might mean unrestricted for the whole term of the season.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

Q. Mr. Sanders, these labor troubles you speak of related to steamship labor, did they not, entirely?

A. Well, shipping labor entirely. I don't know that there were any sailing vessels in port at the time, but if there were, they
165 were probably also affected. It would affect the railroads where vessels loaded at their own wharves, because the men working on the ships, of course, take delivery of the cotton on the wharf of the railroad.

Q. The result of these troubles was to cause a considerable congestion of freight, was it not, which ordinarily was carried away by vessels?

A. I don't know that there was any great congestion from that cause. The stoppage of labor during October and November was not possibly more than a week's time. That might have congested it somewhat, but, after we got working under Federal protection, we moved our cotton as rapidly as we had ever done before, and, with the one exception of the week, in about the early part of November, we had no congestion on our wharf at all. I fancy the congestion was more the result of the rush of the season's business—an unusually large cotton crop—than the labor troubles.

Q. Was there not an unusually large cotton crop?

A. I think that was the difficulty, a very large crop that season, and it had to be rushed to market very rapidly; very rapidly indeed. There is no doubt there was congestion at that time, but I

don't think it was entirely owing to the labor troubles, but the congestion was there.

Q. Mr. Sanders, you say this term "unrestricted" was used only in T. and P. contracts of this character of engagements; is that correct?

A. My recollection is that it was used until possibly quite recently only by the T. and P. road and their connections. Now, there is a modification, somewhat in this season, and possibly last season. I think I am correct in saying that in 1894 only that road—I would like to qualify that, if you will permit me. There are some of the connections of the T. and P. road, for instance, the Southern Pacific Company, and other possible connections. The Southern Pacific road brings in cotton on such engagements as this. And the T. and P., I understood, for reasons of its own, declined to enter into
166 engagements, in a great many cases, to deliver by any particular time. The inference unquestionably was that the other party was entitled to the same right, as to the reception of the cotton. I never knew the Texas and Pacific to controvert that inference.

Q. Isn't it a fact that in conversations, that Mr. Miller has insisted that the Texas and Pacific wouldn't assent to that arrangement, and insisted on the immediate reception by your own steamship line, of the cotton when it arrived?

A. I cannot say. Mr. Miller may have said so, but it certainly had no effect. We would certainly never dream, of course, of making an engagement which would be binding on one and not on the other. I couldn't say positively in regard to that; it may be so; practically, of course, it has been without result, for the obvious reason that we could not agree to it.

Plaintiffs' counsel reads from the deposition as follows:

Redirect examination by Mr. CLEVELAND:

Q. Mr. Sanders, will you state, if you please, what watchmen you had engaged for your company at its terminal in the city of New Orleans prior to the destruction of the dock on November 4th?

A. I can't remember the exact number of men, but we doubled or trebled our force, and if I remember correctly, immediately after making the contract with the colored screwmen, and anticipating, possibly, some incendiarism, I believe we had six or eight, possibly more men, at night on the cotton which we had on our wharf.

Q. And what accumulation of cotton did you have on the average on your wharf?

A. At that time we had the cargo for a small steamer that was due, I think, some 4,000 and odd bales. That was in the city of New Orleans, at the place I have mentioned. We, of course, also notified the police that we anticipated difficulty, and that we would expect them to keep particular watch on our wharf, and have men there.

167 Defendant's counsel reads from the deposition as follows:

Recross-examination by Mr. TAGGART:

Q. What other freight did you have there besides the cotton?

A. I think, some 200 tons of cotton seed, oil cake, and very little else. That was right in the city of New Orleans. On the levee, in the centre of the business portion of the city. Our line was one of the steamship lines which took up the fight against the white screwmen. And it was at that time, and for some time after, we kept a number of extra watchmen on. The fire on our wharf broke out, I think, about noon on Sunday; about midday on Sunday the 4th, I think, of November.

Q. What was the size of your wharf?

A. Well; the space where this cotton was stowed would probably be some 400 feet long by some 70 feet in width. I think there were more than six men on watch on the wharf. I fancy there were more. They were spread along over the freight, on top and on the sides of it, and patrol-ing it generally. This cotton was not piled in sheds. The cotton was headed, as they call it, close together on the wharf under the shed, and also covered with tarpaulins. We had, at that time, sheds some 700 or 800 feet long. Open at the sides. We were not allowed by the authorities to close it in. These watchmen were Boylan watchmen employed by us. The fire lasted possibly three hours.

L. HERZOG, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I reside in New Orleans, and have lived there quite a number of years. During 1894 I was in charge of the Illinois Central property at Southport; that is the elevators and wharves. Southport
168 is not within the limits of New Orleans; it's in another parish, but it's only about a mile above the limits of New Orleans; that is, of the city of New Orleans. It is not one of the terminals of the Illinois Central railway. The terminals are in the city, but it's a branch of the Illinois Central road running out to the river, in Jefferson parish.

Q. Will you please to describe, generally, what you have at Southport?

A. The company owns the wharf there, covered with a shed—half covered only—and two elevators. The loading of ships is done at Southport. I recollect the time of the labor troubles in New Orleans; about October and November, 1894.

Q. State, if you please, what extra or additional precautions you took during the time of the labor troubles to guard Southport?

A. We had a number of special watchmen engaged, who were sent to New Orleans by the company from Chicago and other points, and some were engaged here in the city. We had at one time,

probably, 25 men, extra men, at night, and perhaps one-half that number in the daytime.

Q. What fire apparatus did you have there? Will you describe that to us?

A. We had at that time eight stand-pipes with hose attached to each, with a hundred feet of hose attached to each stand-pipe, and they were 200 feet apart, so that the hose from one could reach far enough to meet the other. Then we had a number of fire-extinguishers. I don't know how many at that particular time, but we had, during a certain part of that season, as many as twenty-five, or perhaps more. By fire-extinguishers I mean the Babcock fire-extinguishers.

Q. Did you at any time have any drill of men for fire purposes?

A. No, we had no drill, but we tried the fire apparatus. It is customary with all railroads to fire off the extinguishers once in a while, and we also saw that the hose was in proper order. For some time we tried the hose every day, but I don't know whether
169 that was at that particular time. We tried it every day, or rather, we washed the wharf off every day, and at the same time tried the hose.

Q. What accumulation of cotton did you have at Southport at any time in November, 1894?

A. I am hardly prepared to answer that question, because we had at one time as many as 14,000 bales, and at other times perhaps one-half.

Q. How was it stowed—piled or headed?

A. Headed; all headed. We head our hose rolled up at that time on reels. It was fed from a tank. The tank was about 150 or 200 feet from the wharf. There was an understructure holding the tank. The tank holds 58,000 gallons.

JOHN GASSENBERGER, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I reside at Westwego, right opposite the elevator, on the Zeringue plantation. I keep a saloon there. We lease the whole place, and also keep the stock on the Zeringue plantation. I was engaged in this business in November, 1894. I couldn't exactly say that I recollect the day of the fire at Westwego, but I recollect the fire. I recollect the occurrence of the fire. I first heard of that fire between 7 and 8 o'clock in the evening; I first heard some screaming of people on the levee of a fire on the wharf. I was in the saloon at that time. I at once went right down to the elevator and gave the alarm, in order to get the switch-engine out to get cars out from the wharf, and blew the whistle. I blew the whistle in the engine-house attached to the elevator.

Q. When you got there who did you find in the engine-house?

A. At the present time, didn't find any one. The watchman was

making his rounds in the elevator. There was no one in the engine-room.

170 Q. How long after you first blew the whistle was it before the engineer came?

A. About five minutes. He lived right at the canal with his family. I kept on blowing, to get everybody there I possibly could, and in about five minutes the engineer came. Before the engineer came nobody started the engine. I did not, because I didn't know anything about it.

Q. How soon after you first blew the whistle did the watchman appear?

A. Oh, at once. He heard me coming, heard the people screaming, and he was down in a few seconds, you may say. I stayed there in the engine-room about half an hour. I assisted there—saw there was a sufficient quantity of coal. I didn't know how long it would last, and thought I would assist him in getting more coal in. They had the coal-house right next to the engine-room. I helped bring in more coal.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

Q. Have you any way of fixing the exact time that you heard this screaming?

A. No; I ain't positive exactly.

Q. Did you see the fire when you heard this calling?

A. Yes, sir.

Q. And how much was on fire?

A. That was on the upper portion. The upper shed. There was very little fire in there when I saw it. The fire was about the second division on the upper shed; you could see it under the roof, by being on top of the levee. I went down on top of the levee, and ordered all my men out at once, to go on the wharf and try to get out what they could. I myself went down to the elevator. The fire was plainly visible in the upper shed. I couldn't tell you how rapidly it spread. I was occupied in the elevator.

Q. How much fire could you see as you went down on the levee?

171 A. Oh, going down, I didn't take time to turn around; I was that anxious to get down. My place is right opposite the wharf. Right northwest from the wharf, you may say. And about 400 feet from it.

Q. When you heard this calling you looked, if I understand you, or went to see what it was?

A. I went right at once; I heard my darkies, who were on top of the levee, screaming fire, and I at once ran down; didn't stop, only to tell them to come on and assist.

Q. Was there any time that you saw the fire before you got to the elevator?

A. No, sir; when I got in the engine-room at the elevator, there was, at that moment, nobody there, but the watchman came just

the moment after I got there; he was making his rounds at the present time. He was there while I was blowing the whistle.

Q. Do you know what he was doing at that time?

A. He was continually keeping up steam. He was firing up, to get steam up. The engineer came from the company canal, just below there. I reckon it was about five minutes, more or less, before the engineer came. I think, about five minutes. I can't fix the time at all under those circumstances. When the engineer came he started the pump. There was a large pump in the engine room. That large pump was connected with a heavy pipe running to the river; a 6-inch pipe, and that then feeds the large tank there was above. That tank was about 30 or 40 feet above the ground around there; it was a considerable height above this shed.

Q. So from that tank there would be considerable pressure on the pipe running to the shed, if it was kept full of water?

A. Yes, sir.

Q. There was a four or five inch pipe running from this tank off under this wharf, wasn't there?

A. I don't know the size of the pipe running from the tank to the wharf. There was a pipe, an iron pipe.

Q. When did you see the fire after you went to the ele-
172 vator?

A. I saw it when I first went down and when I came back. I stayed down there about an hour. Everything was ablaze then. Everything all covered with flames, and burning up. It spread rapidly.

Plaintiffs' counsel reads from the deposition as follows:

Redirect examination by Mr. CLEVELAND:

Q. You don't know anything about the pressure from that tank into the pipe, do you?

A. No, sir; I couldn't tell you. I don't know the height of the tank, except to guess it. I never measured it. In my estimation it was between probably 35 and 40 feet, that's the top of the tank. The foundation of the tank is considerably below the levee.

Defendant's counsel reads from the deposition as follows:

Recross-examination by Mr. TAGGART:

Q. But the bottom of the tank, holding the water, is not considerably below the levee?

A. No, sir.

Q. I am not speaking of the bottom, I am referring to the foundation above the levee.

A. Yes, sir.

Q. That is, the ground on which the timbers rest which support the tank?

A. Yes, sir.

Plaintiffs' counsel reads from the deposition as follows:

Redirect examination by Mr. CLEVELAND:

From my house to the engine-room was, in my estimation, about 500 feet.

Q. Were there any police over at Westwego, that you ever saw?

A. I am one, personally.

Q. You are the one person; you are the one policeman for that district?

A. Oh, we have several more.

Q. I mean at that time.

173 A. There was a man by the name of Jerome Lafrance. I don't know where he was at that time. He was the policeman for that district; I couldn't say where he was then. There is no fire-engine near there. The closest fire-engine we have is in Gretna. Gretna is about five miles from my place. This other policeman lives seven miles from me. I am not a paid policeman. I am only a policeman specially deputized. I am not entrusted with any police duties.

Defendant's counsel reads from the deposition as follows:

Recross-examination by Mr. TAGGART:

Q. At that time there were no disturbances over there, were there, of any kind?

A. No, sir.

Q. And had been none?

A. At that present time; no, sir.

Q. Or in connection with any labor troubles here in New Orleans, there had not been any disturbances up and about there, that you know of?

A. No, sir; not that I know of.

Plaintiffs' counsel reads from the deposition as follows:

Recross-examination by Mr. TAGGART:

I did not hear prior to that time of any supposed incendiary fires having taken place on the dock. There were labor troubles at Gretna before that time. And I think an injunction had been issued out of the United States court on account of them before that time.

Q. What were the troubles at Gretna?

A. Well, from what I can understand, it was to give them half and half in the work on the ships; that is, on the Parish of Jefferson side. It was a trouble between the white screwmen and colored screwmen who lived at Gretna. Not exactly in Gretna, but between the whites of Gretna and the colored laborers, no matter where they lived, whether over here or in Gretna. I know young Valle.

174 Q. How old a boy is he?

A. Somewhere around in the neighborhood of 20 or 21; I don't know exactly.

THOMAS N. BOYLAN, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am principal of the Boylan Detective Agency. I have been connected with the police since 1855, in New Orleans, and have served in almost every capacity, as chief of police and superintendent, and this agency was organized in April or May, 1880. Mr. Farrell was then the principal. He died during the exposition, in January, 1885, and I assumed the duties from that time to this, as the principal. In October, 1894, there were labor disturbances in the city of New Orleans. I don't remember exactly what time these disturbances began; some time within a month of that time; about a month or three weeks or so; some time in November, or at least it was some time during that month, probably a little previous to that. I mean the month of November. I do not remember how early in October they did begin.

Q. You know the place called Westwego?

A. Yes, sir, I know of it.

Q. In November, 1894, was it within the port of New Orleans?

A. No, sir.

Q. What parish is it in?

A. I think it's in the parish of Jefferson, adjoining the parish of Orleans.

Q. And had it, in November, 1894, any city, village or county police protection?

A. They had a police jury and sheriff and marshal; one or two men; I don't know that there were any more than that—that is, for the town of Gretna. I think Westwego was under the jurisdiction of Gretna. I think there are several fire-engines in the town of Gretna; there were some time ago. I won't say positively
175 there was in November, 1894. I know there has been, but I haven't been over there for a good while. I don't know how far from the Texas and Pacific Railway Company's dock at Westwego the nearest fire-engine house was in November, 1894. I am not familiar with Gretna nor with Westwego. That's the duty entirely of our superintendent and captain; considered the harbor work.

Q. What was the alleged cause of the labor disturbances in November, 1894, at New Orleans?

A. Well, there was a feeling between the two bodies of labor, the white and colored, and it appears there was some dissatisfaction between them. The whites seemed to be getting all the work and the negroes didn't like it, and the result of it was that some of the ship agents took upon themselves to employ the colored men altogether, and that brought about the trouble. That was about the cause of it. The dispute was between the cotton people, that is what are known as cotton screwmen and longshoremen. It was principally between negro cotton screwmen and white cotton screwmen.

Q. Do you know, on November 12, 1894, what class of cotton screwmen the Texas and Pacific Railway Co. employed?

A. I don't know that they employed any.

Q. Do you know what class of labor was employed by the stevedores at work at Westwego, whether colored or white?

A. Well, previous to this trouble they were mixed, white and black.

At one time the Texas and Pacific Railway Co. employed our people, and do so yet. They have for quite a while. We are still employed by them; we furnish them men; watchmen. At the present time we furnish them watchmen. I can't remember exactly when we first furnished any men to the Texas and Pacific in 1894, but I have memoranda here from which I might be able to give you an idea (the witness produces memoranda, and referring to it, says):

In October we had men working for them, I know; October,
176 1894. We had men employed on the first of October, 1894.

On the 7th of November there were three day men at Westwego, and five night men; on the 8th of November there were at Westwego three day and three night; on the 9th, three day and three night men; on the 10th, three day and three night; on the 11th, three day and three night, and on the 12th, three day and three night. Then on the 13th there was one night man and no day man.

Q. From the 1st to the 14th of November, 1894, the labor troubles were about at their height, were they not?

A. I don't recollect exactly the dates. I don't believe that the excitement had reached its height on November 9th; probably it was some time subsequent to that.

Q. In November, 1894, did you make any report to anybody?

A. Yes, sir; generally we make reports in the cases of cotton fires to the cotton exchange. I have copies of all the reports that I have made.

Q. I would like to have you produce those, if you please. You also had reports made to you, Col. Boylan, had you not, by your various employees from time to time?

A. By all means; for when anything happens or anything occurs in any way connected with what we have in charge, it's their duty to report to the officers, to the sergeants and roundsmen, and through them it comes to me.

Q. You did, as a fact, receive such reports from your various employees, did you not?

A. I suppose we did. O'Connor was my superintendent at that time. J. P. McArdle was our captain of the harbor. He was in my employment and is still. And so is Captain O'Connor. He is the superintendent of my office.

Q. Col. Boylan, did you furnish any men to any of the other railway companies in October and November, 1894?

A. Well, we furnished all the Southern Pacific watchmen and the Northeastern's.

Q. To any other?

A. Sometimes, but not as a general thing. It's a regular
177 thing with the T. & P., the Southern Pacific and the Northeastern; we furnish them all their watchmen.

Q. But in October and November, 1894, did you furnish any men to other railroads besides the Southern Pacific?

A. The Southern Pacific and Northeastern. No others. The sheds or docks of the Southern Pacific, where our men were employed in November, 1894, were on both sides of the river. Algiers is right opposite the city, and they have a depot on the city side and on the Algiers side. The docks or sheds of the Northeastern railroad, on their own line, were on what is known as Press street, in New Orleans.

ROBERT E. KERKAM, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am in charge of the United States Weather Bureau in the city of New Orleans.

Q. How long have you been in charge of that bureau?

A. I was in New Orleans twice, first from 1887 to 1890 and again from 1893 until this time. I have with me the record for November 12, 1894; I produce it. These observations were taken under my own direction. A summary of the weather for November 12, 1894, is as follows: The highest temperature during the day was 57, and the lowest was 36. There was no rainfall on the day, and the sky was clear nearly the entire day. The water in the Mississippi was $2\frac{5}{10}$ above zero of the gauge. The zero of the gauge is the low-water mark. Gauges, all river gauges, are graded differently; that is, $2\frac{5}{10}$ on the gauge at New Orleans wouldn't be comparable with a similar gauge reading at Vicksburg, and this is $2\frac{5}{10}$ above the zero of the gauge. In order to get an idea of what that means, the highest water we ever experienced in New Orleans was 18. That
178 was extreme high water; that was a flood stage. This $2\frac{5}{10}$ is considered a low stage. That means above the lowest water mark, and this in comparison with the low-water mark of 74 or 75. Zero is the bottom of the low-water mark. And the water at this time was $2\frac{5}{10}$ above that. It was low water.

Q. When had you had your last rain previous to November 12, 1894?

A. Previous to November 12th; it rained on the 3d from 6.15 in the morning to 3.10 in the afternoon; that was on the 2d.

Q. A heavy rain—the second of November?

A. Yes, sir; from 6.15 till 3.10, a light rain.

Q. Was it a heavy rain on the 2d, or a light rain?

A. It was just a moderate rainfall; couldn't be classed as either heavy or light; it was $\frac{57}{100}$ of an inch. And then it rained during the night between the 2d and 3d, a light rain, of $\frac{6}{100}$. And between the 2d of November and up to the 12th we had no rain. Prior to November 2d it rained in New Orleans on the 28th and 29th of

October. There were showers on the 28th of October during the afternoon from 3.10 to 3.58, and again from 4.05 to 4.15. The rainfall that day was $\frac{43}{100}$ of an inch. There were frequent light showers during the 29th, giving a total for the day of the 29th of $\frac{46}{100}$ of an inch. And between the 29th of October and the 2d of November there was no rainfall.

Defendant's counsel reads from the deposition, as follows:

Cross-examination by Mr. TAGGART:

Our record shows the wind. The wind on the 12th of November was 119 miles in twelve hours and 45 minutes; that was from the northwest; 22 miles from the east in 4 hours and 15 minutes, and 51 from the southeast in 7 hours.

Q. Now, the 119 miles in 12 hours and 45 minutes; just explain what that means, please?

A. It means that the wind blew from the northeast for that length of time, and that that number of miles were registered.

179 Then, to get the rate per hour, although it might not be exact, you would divide the 119 by 12, and it would give you the average rate per hour. It would give you the average rate from the northeast, but this record does not show whether it was a continuous wind from the northeast, or whether it changed to the northwest or the southeast. The maximum velocity of the wind during the day, between 7 o'clock in the morning and 7 o'clock in the evening, was 11 miles from the northeast. That was the highest velocity taken at a 5-minute measurement of the wind thermometer.

Q. Our record shows the direction and velocity of the wind at 6 p. m., and on either side of 6 o'clock. At 7 o'clock it was southeast and blowing nine miles.

By Mr. CLEVELAND:

Can you give us a record of those entries on November 12th, giving us all the particulars you have relating to that day, in this book or in your record?

A. I will give it to you as it appears on record in my office, and certify to the copy over my signature.

(The following is the record:)

Subject: Meteorological data on November 12, 1894.

U. S. Department of Agriculture, Weather Bureau.

Office of the Observer.

(Station) NEW ORLEANS, LA. (Date) *March* 18, 1897.

"Statement showing the weather conditions at New Orleans, La., on November 12, 1894, as copied from the U. S. Weather Bureau records.

"Light frost and thin ice reported from suburbs in morning; lowest temperature of morning at station 36° Fahrenheit; clear

180 skies prevailed during the day, with northeasterly winds; there was no rainfall. From midnight to 9 a. m. the wind

blew from the northeast; from 9 to 11 a. m. from the east; from 11 a. m. to 1 p. m. from the northeast; from 1 to 4 p. m. from the east; from 4 to 5 p. m. from the northeast; from 5 p. m. to 6 p. m. from the east; and from 6 p. m. to midnight from the southeast. The wind movement from 5 to 6 p. m. was six miles; from 6 to 7 p. m. 7 miles.

"I hereby certify that the foregoing data was copied from the official records of the U. S. Weather Bureau, on file in this office.

"(Signed) ROBT E. KERKAM,

"*Local Forecast Official & Section Director.*"

THOMAS N. BOYLAN, recalled as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

Q. Colonel Boylan, have you produced the books which I asked you to yesterday?

A. Yes, sir; there is my book-keeper with them now—the time book.

Q. Please state from them the names of the persons whom you furnished to the Texas and Pacific Railway Company in November, 1894. I am asking and calling for the names of the persons who were at Westwego?

A. We had, on the 6th, James Brown on the day, and P. H. Campbell and M. Peters.

Q. And on the night?

A. On the night of the 6th, was D. Brown, E. Peake, P. A. Robeau, B. Solomon and E. Hilderbrand.

Q. Now on November 7th?

A. November 7th, on day duty at Westwego was James Brown, P. H. Campbell and M. Peters, and on the night, J. Lobestein, E. Peake, P. A. Robeau, B. Solomon and another man by the
181 name of P. Schoen, and that's all the night men at Westwego on the night of the 7th.

Q. And now on the 8th?

A. On the 8th, on the day, at Westwego, was James Brown, P. H. Campbell and M. Peters.

Q. And on the night?

A. On the night, E. Peake, P. A. Robeau and P. Schoen. That was the night of the 8th.

Q. And now on the 9th?

A. On the 9th P. H. Campbell, on the day, and J. Lobestein and M. Peters; and on night duty at Westwego were E. Peake, P. A. Robeau and P. Schoen.

Q. Now, on the 10th?

A. On the 10th, on day duty at Westwego, P. H. Campbell, J. Lobestein and M. Peters; and on night duty E. Peake, P. A. Robeau and P. Schoen.

Q. And on the 11th?

A. On the 11th P. H. Campbell, on the day, J. Lobestein and M. Peters; and on the night, E. Peake, P. A. Robeau and P. Schoen.

Q. And on the 12th?

A. On the 12th P. H. Campbell, day, and J. Lobestein and M. Peters; and on the night, E. Peake, P. A. Robeau and P. Schoen.

Q. What you did in relation to furnishing men to the Texas and Pacific Railway Company you did, I suppose, under their orders?

A. Yes, sir; whenever they required more or less men they would always give me instructions to furnish the necessary number. Not always written instructions. Sometimes they would send written instructions for men, and sometimes give the orders to the captain. The condition of the labor disturbances in New Orleans, say about the 8th of November, was very serious, and continued so until such time as the militia was called for by the governor. I think that was late in the month of November.

Q. Have you found out yet what police protection the Texas and Pacific Railway Company had at Westwego from any town, city or village authority?

A. That I know nothing about at all. I simply knew that
182 among the watchmen over there, there were men employed by the railroad company also as watchmen. That I only know from the reports of the men, because our men had supervision over them.

Q. Well, if you will confine yourself only to things regarding which you know of your own knowledge, please tell me, if you know, whether the Westwego town, city or county authorities furnished police protection to the Texas and Pacific Railway Company?

A. I couldn't say positively, but I hardly think they did.

Q. Have you ascertained yet how near the nearest fire-engine house was to the dock?

A. No, sir; never gave it a thought. I am not familiar with that part of the river. For many years I haven't been over there, and during most of this riot I was an invalid in a manner, but still all the reports came to me; I was in the office.

Q. Will you be good enough to look at the paper which I now show you, dated New Orleans, November 13, 1894, and consisting of four typewritten pages, and which will be marked for identification "Plaintiffs' Exhibit No. 3." Will you be good enough to state whose signature that bears, Colonel?

Paper marked for identification Exhibit M (printed *post*, at pp. 281 *et seq.*).

The witness, being handed the document referred to, says:

That's my secretary's, H. S. Michel.

Q. You recollect whether you read over the report before you furnished it?

A. As I say, it's possible I was unwell at the time; I may have been sick at the time when this report was made, but when I am in the office I generally sign the reports myself, but it's possible I was not there at that time, although I read them afterwards certainly.

I read them over afterwards when I recovered if I did not read them at the time. My attention is always called to them.

183 Q. Do you know of any corrections you have made in your reports to Mr. Smith?

A. I don't know that I ever did make any.

Q. Do you know who made up the report that I have just shown you; it's signed, you say, by your secretary, but who made it up?

A. The report speaks for itself, I suppose, as to who the report was made by. The captain, I think, made up the reports.

Q. Won't you look at it and state to me, Colonel, all the persons who apparently had a part in the making up of the report, giving me their full names and addresses?

A. This report was made by Captain J. P. McArdle. He is now in my employment. This report was made by Mr. McArdle himself. He made it up, of course, and he gives the names of the different officers who give him the information, and they are all named in the report.

Q. And judging from that report, you would say that McArdle made it up, and he alone?

A. He alone, through information he received through other sources, and he gives the names of all the persons from whom he received statements. I have never been at Westwego since that cotton shed was put there.

Q. Either before or after the fire?

A. Oh, I have been there before the fire, but never while that cotton shed was there, but before that cotton shed was in existence. Since the cotton shed was built I have never been there. I know nothing of the conditions surrounding the cotton at Westwego. The names of the head men in my office in the months of October and November, 1894, are as follows: W. J. O'Connor was the superintendent. He was the next under me. He was interested with me; had an interest in the business. Captain McArdle was captain of the harbor; has charge of the harbor. The name of my secretary was Michel, and the name of my book-keeper at that time Elfert. That is about the detail of nearly all the principal portion of the office, except possibly our cashier, and he has nothing at all to do with these matters.

184 Q. You keep copies of the reports that are furnished by you to your various employers, do you not?

A. That depends altogether upon the circumstances. Some reports are not of sufficient interest to send out, but in most cotton cases we do, particularly to the cotton exchange.

Q. Did you report from day to day to the Texas and Pacific Railway Company in October and November, 1894, while you were furnishing them men?

A. We reported only just such services as were necessary, in case of insurance, and the details at the depots and other incidents, the condition of the cars and such things as that, whether the seals were in order; that's a daily report. We made a daily report of what took place at Westwego in case there was any necessity for it.

Q. Well, did you as a matter of fact make to the Texas and Pacific

Railway Company during the months of October and November 1894, daily reports of what occurred at Westwego?

A. Not unless there was something to report.

Q. I suppose you made a report, did you, of the fire?

A. Oh, certainly.

Mr. CLEVELAND: Now, Mr. Taggart, I will ask you to produce that report.

Mr. TAGGART: What report?

Mr. CLEVELAND: The report that Mr. Boylan made to the Texas and Pacific Railway Company on the fire.

Defendant's counsel reads from the deposition as follow-:

Cross-examination by Mr. TAGGART:

I have been at the head of this agency since 1884—January, 1885. It had been fully established since in 1880. It was not the successor of any previous organization of a similar character. It has extensive business connections in the way of police protection and watching here in New Orleans.

185 Q. What territory does its officers control? I mean under private employment of the character you have been testifying to.

A. Well, the commercial portion of the city, including all the banks, such establishments as that, and a great deal of the upper portion of the city; for instance, the tenements. On the harbor we have a great many men out there; it depends altogether on the cotton season.

Q. That is, in the cotton season you control all of the harbor?

A. Not all, but nearly all of the cotton vessels, and cotton on the wharves, &c. I believe there is another party out there has a little work, but not of any great consequence. We have a majority of it.

By Mr. CLEVELAND: The other concern don't amount to much?

A. They have been trying to make a living at it, but it's pretty hard work.

By Mr. TAGGART: The name of the other party is F. Cuny, I believe. He hasn't any definite place. If they can get watching to do, why they do it. That is in the harbor.

Q. Isn't it a fact, Colonel, that so far as the reputation of your agency was concerned, in many cases, the Underwriters' Association had insisted on your watchmen being placed on the cotton wharves?

A. Yes, sir; that was one of the cardinal rules when we first organized under the auspices of the board of underwriters.

Q. That was one of the reasons for your organization?

A. Yes, sir; on account of the fires on shipboard, and one thing and another.

Plaintiffs' counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

Q. Did you have any other railway companies under your supervision at this time?

186 A. Yes, sir; the Southern Pacific and the Northeastern companies.

Q. And the wharves of shipping companies?

A. That is, while cotton is on the wharf.

Q. You did increase the force from time to time?

A. According to the accumulation of cotton.

Q. As the cotton increased?

A. Yes, sir.

Q. And did you not, as these increases were made, have additional men put on?

A. Certainly.

Q. And directed with reference to it?

A. Yes, sir.

Q. And had all the time then, prior to the 12th of November, such a force of watchmen upon that wharf at Westwego as, in your judgment, and from your experience as the head of an agency guarding cotton, you considered fully sufficient to meet all the requirements of watching at that place?

A. Yes, meet it in this way, with the assistance of the other men that were employed also by the railroad company in addition to our force.

Q. That is, the entire force—you considered the entire force there as sufficient, including the men who were acting under the direction of your officers?

A. Yes, sir.

Q. To fully protect the cotton that was there in the condition in which it was?

A. Yes, sir.

Q. This report, Plaintiffs' Exhibit No. 3, which you have identified, that is a carbon copy made on the typewriter, of a report which you made to the Underwriters' Association?

A. To Marshall J. Smith. He is a member of the board of underwriters in New Orleans, at least one of the insurance agents, and represented the National Board of Underwriters of New York.

Redirect examination by Mr. CLEVELAND:

I knew absolutely nothing of an accumulation of cotton at Westwego.

Q. Therefore, you didn't at all regulate the number of men by the accumulation at Westwego of cotton, did you?

187 A. I know nothing of it myself, personally, but the captain and the superintendent——

Q. Don't state anything which is not of your knowledge.

A. Of my knowledge, I didn't know anything about the accumulation of cotton there; of the quantities.

Q. And as far as you acted in the matter, did you regulate the number of men in respect to the accumulation of cotton at Westwego?

A. I don't know that I did; I knew nothing of the surroundings. I never went there since the depot was established there.

Q. You never knew, did you, of your own knowledge, what number of watchmen the Texas and Pacific Railway Company had at Westwego?

A. My men I knew, but I didn't know anything of the others.

Q. From your own knowledge?

A. Of their men, no.

Q. What is the cotton season?

A. Well, it commences about—sometimes it's earlier than others—but along in September; about the middle of September you may say it will commence. It generally increases from September until about the middle of the winter, and it really closes about May. There is a little here then, but not a great deal, unless it is stored in the presses, and so on.

Defendant's counsel reads from the deposition as follows:

Recross-examination by Mr. TAGGART:

Q. Now, these labor troubles you speak of, they were troubles with steamship labor, were they not, exclusively?

A. Yes, sir; what is known as screwmen and longshoremen, working on steamers, not railroads. Not railroad labor; the labor troubles were with screwmen and longshoremen, and they are the men that work on shipboard and around the harbor. They were men employed to load ships exclusively. The railroad companies had no screwmen or longshoremen in their employ.

188 Plaintiffs' counsel reads from the deposition as follows:

Redirect examination by Mr. CLEVELAND:

Q. These screwmen were employed to load ships from docks—railroad docks?

A. Railroad docks; whenever there is a ship taking in cotton the screwmen are the ones to load the ships. They are not loaded by the railroad help, but loaded by regular screwmen and longshoremen.

W. J. O'CONNOR, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

My name is W. J. O'Connor. I live in New Orleans. Will be 49 in December, and am superintendent of Boylan's protection police and detective agency. I have been superintendent since May, 1893. And prior to May, 1893, I had been captain of the Boylan protection police. I had been in that business, I think, from September, 1884.

Q. Look at the paper which I now show you, which is marked for identification "Plaintiffs' Exhibit No. 3," and which was identified by Colonel Boylan yesterday as a report made on November 13, 1894, to Marshall J. Smith, and state what part you had in making up that report.

(The witness is shown the document referred to and reads same.)

Q. Are you able now to state, Captain, after examining that paper, what part you had in making it up?

A. I hadn't any part in making it up.

Q. And did you question the men who were your employees and sent to Westwego concerning the occurrences of the night of November 12, 1894?

A. Captain McArdle questioned them. I think I was
189 present when he questioned one or two. I don't know which ones, but I was present when he questioned the three day men. We questioned them that night. They were Officers Campbell, Weber and Peters. We brought them, to the best of my recollection, back with us over to the fire.

Q. Were you present when Captain McArdle questioned the night men?

A. Well, I won't say positively that I was, sir. I think I was. I think I was present when he questioned them, and got their statements. No, I was not. To the best of my recollection Captain McArdle got their statements and reported to me in the morning at the river station. I don't think I was present. I think they were taken by Captain McArdle in the Jackson Street office. Captain McArdle questioned Vallee, the private watchman of the railway. I don't think I did, but if I didn't I was present when he was talking to him that night, sir. I went over to the scene of the conflagration that night, and possibly I may have questioned him, but I won't say positively, but I was present I know when Captain McArdle was talking to him over there on the bank of the river.

Q. Have you any reason to doubt the accuracy of any portion of this report?

A. I have not. I think it is accurate; it is correct. The thing is so long ago I couldn't remember all of those details. I don't propose to recollect all those things.

Q. No, of course, I understand very well you can't recollect it all, but do you recollect that, in substance, was the statement as it appears in this paper, as made by Valle on the night in question?

A. Pretty nearly that, sir.

Q. Did you interview any of the employees of the railway company, either on that night or on any other night?

A. I believe I spoke to Mr. Trainor that night. Mr. Trainor had formerly worked for the Boylan agency. I think Captain McArdle was with me at the time I talked with him, and I told him to come to the office the next day.

190 Q. Do you recollect when you got to Westwego of telephoning to Captain Barrett of the harbor precinct requesting him to send some tugs to Westwego?

A. No, sir; I didn't telephone him over there; I telephoned before I started over there, knowing the situation, that there wasn't any fire department only down in the city of Gretna—I don't believe there is any up there; I never knew of any. The moment I left home and as soon as I got down there to the landing, knowing the situa-

tion, I telephoned to Captain Barrett who was at the harbor to notify the tugs that generally were around Canal street, that there was a fire up there, and possibly they could render some assistance. That's before I started up at all. I telephoned to the fire department and asked for the loan of some hose. That was from Westwego. After I got over there, some one running around there, some of the employees, said they thought they might save some of the cotton that was on the docks, but that the hose they had on the tugs wouldn't reach to the wharf, but that if they had some more hose that possibly they could save some of the cotton, and I telephoned. I ain't positive now whether it was the chief's office or to Assistant Chief Donovan that I spoke to, and they sent it up to the head of Walnut street.

Q. There was no extra hose at Westwego, was there?

A. There was hose on the wharf before the fire, but I don't know whether there was any extra hose, and I expect a good deal of it had been burned up. You see, we take those things on ourselves, in our business, in order to protect the property under our care, and so I telephoned Captain Barrett, knowing the situation as I did. We don't wait to be asked to do this, but we do it ourselves, in order to try and save property for the insurance companies or for the owners of the property.

Q. You got there before Captain McArdle?

A. No, sir; I think he and I got there together, to the best of my recollection. We met at the Walnut Street ferry. I am
191 almost positive of meeting him there, but it's so long ago I can't remember all the details. And there I met Superintendent Pearsall, Agent Miller and Officers Campbell, Webber and Peters; those three officers were the three men we had over there in the day, and I thought it was advisable to take them back with us, as we might need them through the sheds during the excitement watching the railroad property. When I was going across, the fire was already burning. The fire was burning before I left my house, and I was then living at 1711 Dryades street. I was going across in a skiff; I went over with Mr. Pearsall, Mr. Miller and a representative of the Times-Democrat and the Picayune. And when I got over at Westwego I found some tugs there; they were pumping on the fire, and one of them I think was towing a steamer away from there. The railroad company had no tug that I am aware of. They could have had and I might not know it, but I never heard of their having any tug, any more than their transfer boats. At this time, and at the time of this fire and for some time previously, there had been considerable excitement in New Orleans owing to labor troubles. These labor troubles were troubles between the white and colored screwmen.

Q. Did you have any part in the selection of the men who were detailed to go over to Westwego either for day or night duty for any of the days prior to November 12th, or for November 12th, 1894? I mean in picking out the particular men.

A. We generally left that to our captain to pick them out, and if he picked out anybody we thought didn't suit, we just told him not

to send him either to Westwego or any place. I mean by our captain—Captain McArdle. He generally attended to this part of it and selected the men, and if he sent a man we thought wouldn't suit, we just told him to change him and put a better man there.

Q. You had no personal part in the selection of those men?

A. Possibly I did. I don't recollect that I had. I know
192 Officers Peake, Robeau and Schoen personally. I can't say that I selected any one of them to go over there. I knew they were over there. They couldn't be there without me being told of it by the captain.

Q. You learned that from what somebody else told you?

A. Possibly so, or possibly I may have told the captain to send those particular men there. Sometimes I picked out the men. I have no positive recollection on that point.

Q. How many men did you have in your employment, I mean extra men, on November 12, 1894?

A. I couldn't say that without looking at the rolls. We had a very large number, but I would have to refer to the record. I haven't got that in my mind. I recollect a change in these watchmen on November 12th. I think it was on November 12th that Mr. Miller's representative over there rang up our office and asked for me, said one of the men was smoking under the wharf over there, and I sent a man over to relieve him immediately, sir. The wharf was down on the ground from where he was, some distance, and nobody could reach the wharf from there. That's a rule that we make, that any man put to guard cotton and found smoking is immediately dismissed; that's a rule Colonel Boylan has always established. Joseph Loebsfein was the name of the man who was dismissed.

Defendant's counsel reads from the deposition as follows:

Direct examination by Mr. CLEVELAND:

Q. On learning that there was no hose there you telephoned to either the chief or the assistant chief of the fire department?

A. I didn't learn there wasn't any hose there; that was a mistake. I was informed by somebody that the tugs claimed they would like to get some hose over the docks, claiming if they had some hose over to the tugs that would reach the wharf from the tugs out in the river they could save some of the cotton. I did not make
193 any inquiry as to whether there was any such hose there or not, because it was useless to make any inquiries as the wharf was all on fire; and if there was any hose there it would be burned up, or couldn't be got at, sir.

Cross-examination by Mr. TAGGART:

Q. Mr. O'Connor, what time did you first hear of that fire?

A. I disremember now who rang me up, but somebody rang me up and told me Westwego was on fire. It was somewhere along between 6.15 and 6.30. I lived about sixty-six blocks from the Westwego ferry. To get to the river I walked right straight out

Felicity road, the distance being about seven squares, and took the car; then rode out to the front, to the ferry. I don't think there was an electric car then; I think it was a mule car at that time.

Q. And at the ferry you found the gentlemen whom you have named?

A. They were either ahead of me or got there just before we secured the skiff. I could see Westwego from there.

Q. What was the condition of the place?

A. Everything was ablaze; and I got a skiff and went over as soon as I could.

Q. Could anybody work on the dock at that time when you got there?

A. Well, possibly on a portion of it they might have, but I don't think so, sir; so much of the cotton on fire and the heat was so great it would keep anybody from getting on the shed.

Q. Prior to November 12 you were familiar with the situation of affairs at Westwego, were you?

A. Well, I had been over there several times that fall.

Q. And were familiar with the requirements as to guarding cotton on the wharf, were you?

A. Yes, sir.

Q. Did you consult with Captain McArdle as to the number of men to go over there from time to time?

194 A. That was arranged in this way. We consulted with the railroad company. Captain McArdle consulted with Mr. Miller in regard to the matter, but if he found there was more freight than the men over there could guard, it was his duty, the duty of Captain McArdle to call Mr. Miller's attention to it.

Q. And he would put more men on?

A. Yes, sir.

Q. And when he would thus put more men on you would be notified?

A. Be notified.

Q. Your understanding was, was it not, prior to November 12, that there were a sufficient number of men there to guard those wharves as wharves are generally guarded, in your experience?

A. Yes, sir; I don't think we had any occasion to call Mr. Miller's attention to anything. I think around the election, on the 6th, that I called his attention during the excitement there that possibly it would be advisable to put on an extra man or two around the night of the election and the night after the election. That I won't be positive of, but I think so; however, the time-list would show that.

Plaintiffs' counsel reads from the deposition as follows:

Redirect examination by Mr. CLEVELAND:

I won't be positive; when I was at Westwego last, prior to November 12, 1894; it may have been a week or ten days before that. There was a small fire that called me over there in the daytime, a couple of bales of cotton on fire. I went over on the next morning.

It was the morning after these two bales of cotton were on fire. Between that time and November 12th I don't think I had been there. I did not know on November 12th how much cotton was there, or its value.

Q. Now, let me understand you. Did you consult at all with Mr. Miller as to how many men you should put on?

A. Well, Captain McArdle consulted with him as to that.

Q. How lately had you seen Mr. Miller about the number of men that should be furnished?

195 A. I suppose possibly I may have seen Mr. Miller every day for a week, and then I might not see Mr. Miller for possibly two or three weeks. On that particular point I have no recollection.

Q. You have no recollection of ever consulting him as to how many men should be placed at Westwego?

A. When we first put them up there, yes, sir. Mr. Miller, if I recollect right, came to the office and had a talk about the number of men. I forgot when we put them there, whether it was in the winter of '93 when we began, or the fall of '92. I think it was '93, but I won't be positive on that point. I would have to have our records to refresh my memory about it. It was long prior to this fire.

Q. And in relation to this increase of force you had nothing to do with that?

A. I had that much to do with it that the captain reported to me, and if it wasn't right we would go and see Mr. Miller; but I don't think the occasion ever came when he reported there wasn't a sufficient number of men. I know nothing whatever of any conferences between Mr. McArdle and Mr. Miller.

Q. You had nothing, personally, to do with saying how many men should go over there, had you?

A. Well, it was Captain McArdle's duty to report to me how many men he thought was necessary, and if there wasn't enough then I would instruct him to go to Mr. Miller and notify him of that fact; that's what I had to do with it.

Q. Do you recollect ever having any conversation with the captain as to how many men you should send to Westwego?

A. I suppose we have had dozens of conversations about it, sir; not only about Westwego, but about all places.

Q. Now, you had on November 7th five men at night on watch at Westwego, according to Captain Boylan's testimony. Who did you consult with as to decreasing the number, if any one? I don't want you to give me general statements, hearsay evidence,

196 but tell me of your own knowledge, if you have any knowledge on the subject.

A. I haven't that knowledge.

Q. On the 6th of November you had five men watching at night at Westwego, and on November 8th you reduced that number to three. What do you know about that reduction?

A. As I told you a moment ago, November 6th was election night, and I think it was on my advice that Mr. Miller increased the force,

if I haven't mistaken about the date. The force was increased for two nights, the night of the election and the night after.

Q. And reduced then also by your advice?

A. Well, the orders were given, to the best of my recollection, to increase the number for two nights only, during the election excitement. Those orders came from Mr. Miller. I think I advised Mr. Miller, to the best of my recollection. And he told me to put on two extra men. I told him I thought that would be necessary. I do not know positively how long those sheds were. I did not know on November 10th or 11th how much cotton there was there. I couldn't tell whether they were piled full or not. I don't know how much cotton was in there at any time. I don't know how many cars were generally left on the track at night. I don't know how many cars were ever on the track at night.

Q. Do you know of Mr. McArdle's ever going over there?

A. I think he did. I never went with him, except the night of the fire that I recollect of.

Q. Then, unless you met him over there, you never knew him to be there before, did you?

A. Not of my own knowledge. That's the only time he and I were ever there together. Of course, I wasn't over there a great many times myself; that was a kind of an out-of-the-way place to get at.

Cross-examination by Mr. TAGGART:

Q. Mr. O'Connor, how long were you over there when you went there after this fire that you speak of?

A. I suppose three-quarters of an hour, sir, or half an hour.

197 Q. And did you look at the wharf there?

A. From end to end.

Q. And the facilities for extinguishing fire that were there; did you observe those barrels, buckets and hose and everything that was there?

A. Yes, sir.

Q. And was there, in your judgment, a necessity as to changing the number of men there who were on watch at that time?

A. No, sir; there was not.

Q. Was Mr. Miller there at that time?

A. I think I met Mr. Miller over there, either as I was going off the wharf or coming. I ain't positive. Westwego didn't appear to be different from other places. In fact, it was to be preferred to some, because it was isolated, and you see on cotton on the wharves through the city where there are public thoroughfares and people coming and going all the time it's hard work to prevent people from smoking, but over there nobody was supposed to have any business on the wharf, and they had no business there. Those were the instructions of our men, to keep people off.

Redirect examination by Mr. CLEVELAND:

I didn't go over there at that time for the purpose of examining the fire apparatus.

Q. You never looked at that fire apparatus on that dock in your life, did you?

A. Yes, sir. When we first took charge over there I went and looked at the barrels and looked at the hose. I never examined to see if it was good or bad hose, but I saw the hose stretched out and saw water in the water barrels.

Q. You saw the hose stretched on what?

A. Hanging from the posts.

Q. Stretched or hanging?

A. When I seen them, to the best of my recollection, they were on the side of the posts.

Q. How much hose did you notice?

A. That I couldn't say.

Q. How long was the hose?

A. I couldn't say.

198 Q. How many hydrants or plugs?

A. I couldn't say.

Q. How many pipes under the wharf?

A. I don't know that I saw any under the wharf, because I wasn't under the wharf.

Q. Were there any under the wharf?

A. I couldn't say.

Q. Were there any on the wharf?

A. Hydrants?

Q. Yes.

A. I couldn't say.

Q. Were there any pipes on the wharf?

A. Yes, sir.

Q. Were there any plugs on the wharf?

A. I couldn't say.

Q. You know the size of the pipe there?

A. No, sir.

Q. You know the size of any plug there?

A. No, sir.

Q. Know the size of any hose?

A. No, sir.

Q. You know how many plugs there were?

A. No.

Q. Or how many pipes there were?

A. No, sir.

Q. How many barrels there were?

A. I didn't count the barrels.

Q. Or buckets?

A. No, sir.

Q. Did you ever see any chemical fire-extinguishers?

A. Don't recollect seeing any.

Q. You know how the pipes over there were fed?
A. No, sir.
Q. Did you ever inquire to find out how the pipe was fed?
A. No, sir; did not.
Q. Did you know how many watchmen the railroad company employed during these labor troubles?
A. No, sir; I did not.
Q. Either night or day?
A. You mean of the Boylan men?
Q. Yes; and of any other men?
A. I understood they had this man Valle at night and another man in the daytime.
Q. How old a man was Valle, in your judgment?
A. I couldn't tell you, sir. As I told you, I only seen him at night; in fact, I had forgotten all about seeing Valle.
199 Q. Did you know that Westwego was without police protection except such as was furnished by the Boylan people?
A. Well, we always understood that the parish of Jefferson had police of its own.
Q. How near to Westwego?
A. Well, I expect they were pretty nearly down to Gretna all the time.
Q. How near to Westwego was the nearest policeman, in your judgment?
A. Well, in my judgment, it's pretty hard to get one. There are some over there, but they have a good deal of territory to cover.
Q. You know whether Westwego had any fire protection from the parish of Jefferson?
A. Never heard of their having any, sir, outside of the town of Gretna. I don't know whether there is an engine at Harvey's canal or not, but I don't think there is.

JAMES P. MCARDLE, called as a witness for plaintiffs, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

I am captain of Boylan's police force, and have been almost 17 years here in New Orleans.
Q. Look at the paper which I now show you and state if that report was made by you.
A. This is a typewritten report from my report. It is the substance of the report I made.
Q. Where is the original of the report?
A. I haven't seen it since I made it. I handed it in to our agency at the time and don't know what became of it. By our agency I mean Col. Boylan's agency. I don't know where the original is. That leaves my possession after I make it. I make the report to our agency and those reports are kept on file as a rule for a while, and then they are destroyed.

Q. You don't mean to say that the original of that report is destroyed?

A. It may be there and may not. All I know is I can't tell.

200 Q. It is uncertain, Captain?

A. Yes, sir; but that's my report. It is a copy of my report.

Q. This report states, Captain McArdle, that at 6.35 on last evening—the report being dated November 13th—Corporal J. A. Boyle came to your house and notified you there was a fire at Westwego. Do you recollect that circumstance?

Mr. TAGGART: We object to that.

The COURT: I sustain the objection. That is wholly innocuous, but it is introducing a part of the report.

Q. What did you then do?

A. Upon being notified by Corporal Boyle that there was a fire at Westwego, I went to what we call our Jackson Street station on the levee at the head of Jackson street and telephoned to Superintendent O'Connor, and told him there was a fire at Westwego. He told me to notify the steamship agents of the ships that were up there about the fire, and I tried to do so and notified everybody I could reach; and as soon as I got through with that, to meet him at the Walnut Street ferry—that is the ferry that runs to Westwego from this side of the river. I got up there as quickly as I possibly could after attending to this and up there met the superintendent, met Mr. Miller and Mr. Pearsall, gentlemen connected with the Texas and Pacific Railway Company, and met our day officers on duty that day over at Westwego. The place was pretty well burned up. I could see that from this side of the river—all a mass of smouldering ruins. The superintendent procured a skiff and Mr. Pearsall, Mr. Miller, the superintendent, and myself and two representatives, one from the Times-Democrat and one from the Picayune, rowed over there at once. When we got there they were trying to save the conveyor of the elevator. The sheds had been destroyed and the wharves and dock, and they were trying to save the elevator and succeeded in doing so. I, of course, inquired around to find out if our

201 men knew anything of the fire, and got statements from which I made up this report.

Q. This report—will it serve to refresh your recollection as to what those different parties stated to you?

A. Yes, sir.

Q. Do you recollect whether Officer Robeau was one of the persons who had been sent over to Westwego by the Boylan agency to engage in the duty of watching?

A. Yes, sir.

Q. Did you see him at Westwego on the night of November 12th?

A. Yes, sir.

Q. When did you last visit Westwego before this date, Captain McArdle?

A. Well, I was not in the habit of visiting Westwego. I don't

think I was over there twice before that, altogether. Each time I went there I went there to see the captains of vessels that were lying there. That was what brought me to Westwego. It was an out-of-the-way place, and I didn't go there, except on special occasions. I could not give you the date when I was last over there before November 12th. I think it must have been within a month or two of that time. Yes, it was a month or a month and a half before this time. I stayed there on that occasion with the captain, in his company, about half an hour, and then came immediately back.

Q. How long before that visit to see the captain of the Clandeboye had you been there?

A. Well, I wouldn't be certain that I had been there before then; but I think I had been over there when another ship was lying at the wharf—but the name of the ship I have no recollection of. I cannot tell you the time I was there then. I do not recall anything that I did on this occasion when I went to see the captain of the Clandeboye, except to go to see him. I went to see him about something in regard to our watchmen watching the ship. I never made a detailed inspection of the fire apparatus that was on that wharf. I do not know anything about it, except what I saw occasionally as I passed through the sheds on my way to the ships.

202 Q. Do you recollect anything at all about it?

A. Well, I remember, if my memory is right, that at the posts, that is, fronting the river side there was a barrel of water and a bucket suspended from the barrel; and on the posts there, I believe I saw hose strung along underneath the shed.

Q. How was it stretched, Captain?

A. Stretched, if I remember right—now, I think they had a bat-on nailed on the post; that is, the one toward the front—and the hose was stretched there, from post to post.

Q. Well, was that the proper way to have it done?

A. It was the usual custom, yes, sir.

Q. That is the usual way to have it done?

A. Yes, sir.

Q. In that way—stretched along?

A. Yes, sir.

Q. So that when the water was turned on the nozzle would be easily accessible. Is that what you mean?

A. Yes, sir.

Q. Do you recollect anything else concerning this fire apparatus except the stretching of this hose?

A. No, sir.

Q. You know how many lengths of hose there were in any shed?

A. I couldn't say.

Q. Or how many hydrants?

A. I don't know.

Q. Or where the hydrants were situated?

A. No, sir.

Q. Or the size of the hose?

A. No, sir.

Q. Or the length of any length of hose?
A. No, sir.
Q. You know the size of the pipe that fed the hose?
A. No.
Q. Or how the hose was fed?
A. No, sir.
Q. Or how the pipe was fed?
A. Couldn't say.
Q. Captain, what part did you take in designating the men who would go over there, I mean those of your agency?
A. Well, the men all reported to me. The night men all reported to me every afternoon and I selected the detail of men for that place. I was the active man in charge of Boylan's Detective
203 Agency at this time on the river front. Captain O'Connor was the general superintendent at the agency, and issued orders to all the officers under him—to myself, for instance. For instance, if four or five men are to be sent to Westwego, he would order me to send that number of men there, and I would make the detail. I had no part in saying how many men should go to Westwego. I generally selected the men that would go. I selected these men to go over there who were on duty at this time—Robeau, Schoen and Peake. I told them what to do; they always had their instructions from me.
Q. Now, what did you tell Schoen to do?
A. Schoen's duties were to watch underneath that wharf and see that no person got under there; that no boats were to be allowed there; to see that nobody would go under there but himself.
Q. Why did you give these instructions?
A. I had orders from Mr. C. G. Miller, freight agent of the Texas and Pacific railroad. They were given to me personally by Mr. Miller; all matters of this kind are given to me.
Q. When?
A. Some time about a week or so before the fire; a week or ten days before the fire I detailed a man under that wharf. He told me to do that.
Q. Did he tell you how many men?
A. On one occasion, when there was an election, the night of the election, we had three men, if I recollect right, underneath the wharf. That was by his orders. And then after that the force was decreased. And that was by his orders. The object of watching underneath that wharf was an extra precaution.
Q. Do you recollect that at this time and for some time previous to November 12th there were labor riots here in New Orleans?
A. There were labor troubles; a strike going on. Up to that time there had been one large fire. I recollect an occurrence that took place on or about October 26th, in New Orleans, concerning the boarding of vessels by masked men. On that night—I don't
204 remember whether that was the exact night or not, but the occasion I remember there was a lot of men, supposed to be cotton screwmen, laborers in cotton, who boarded ships up there and threw the tools belonging to the colored screwmen into the river.

And then I recollect that shortly afterwards there was a large fire in New Orleans at the West India dock. The date of that was November 4th, 1894.

Q. Do you recollect that there was, after that, a conflagration on a ship here?

A. On a ship?

Q. You recollect the Hagee?

A. That was no conflagration; it was a fire in about two bales of cotton in the ship's hold.

Q. At this time is it a fact within your knowledge that the railroad and transportation companies had increased the number of men on watch at night?

A. Don't know anything about that, sir.

Q. How many extra men did the Boylan Company have in its employment between October 15th and November 13th?

A. How many? I couldn't say. At that time we had a very busy season, a large lot of property to be watched, and our force was increased accordingly.

Q. Was it increased on account of these labor troubles?

A. Not specially for that reason, but on account of the accumulation of freight we had to have extra watchmen.

Q. You mean to say that you did not increase the number of men that you furnished to your various customers on account of the labor troubles?

A. Only in one or two instances. I believe we increased the force of Elder, Dempster & Co. and Chas. Stoddard & Co.

Q. Any railroads?

A. No, sir.

Q. You recollect your furnishing an extra force of men to the Southern Pacific?

A. That didn't come under my jurisdiction, but I know I furnished a lot of men to the Southern Pacific.

Q. And the Northeastern also?

A. No; I don't think they increased the force to the North-
205 eastern, but I don't remember now whether they did or not.

Q. You say this Westwego was an out-of-the-way place; was it at that time within the port of New Orleans?

A. No, sir.

Q. Was it within the city of New Orleans?

A. No, sir; it ain't yet; outside of the city limits.

Q. Did you understand whether it had any independent fire protection from any city or town authorities?

A. I don't know anything about that.

Q. Did it have any police protection, to your knowledge?

A. Not to say to my knowledge, sir.

Q. Well, to your knowledge, did it have any fire protection?

A. I can't say that, because I never made an inspection of the place.

Q. Do you know how many watchmen the Texas and Pacific had at Westwego outside of your own?

A. No, sir.

Q. The fire companies in New Orleans never cross over the river, do they?

A. No, sir; never go outside of their limits. The number of men that were furnished to the Texas and Pacific from time to time prior to November 12th were under the orders of Mr. Miller. Those orders were generally given to me; as a rule, given to me personally. Then I increased or diminished the force according as Mr. Miller told me. I do not know the length of the dock at Westwego or the length of the sheds. I do not know the value of the property or anything concerning the value of the property that was at Westwego on November 12th. I don't know what is the length or what are the dimensions of any of these sheds. I don't know how the cotton was piled.

Q. You don't know whether it was piled or headed?

A. It was tiered.

Q. That you learned. You didn't know that?

A. No, sir.

Q. You don't know anything about the gangways that were left there?

A. No, I don't know.

206 Q. And you don't know what number of men the Texas Pacific had on watch, in addition to your own?

A. No, I couldn't say, sir.

Q. How old a person was Valle, in your judgment?

A. Well, I haven't seen the man for some time, but I took him to be a man between thirty and thirty-five years of age. He's a man about five feet two in height, slim built, dark complexion, dark mustache; what we call here a Cadian, a country creole, French descent. He is of French extraction, but a person raised in the country. I don't know what experience he had had in watching. He never told me.

Q. As I understand it, Captain, you don't know how this place was protected against fire except that you sent three officers over there?

A. Yes, sir; with instructions what to do. With that exception, I don't know anything at all as to its protection against fire.

Defendant's counsel reads from the deposition as follows:

Cross-examination by Mr. TAGGART:

Q. How far, Captain, within the port of New Orleans on the river did you have charge of the Boylan watchmen?

A. I had charge of all the men that worked on the river front, from one end of the city to the other.

Q. Within the two outside limits—Chalmette, Southport, Westwego, and all that?

A. Yes, sir; both sides of the river were under my jurisdiction. Whenever there is a request for watchmen at any place, from any source, it comes to me and I detail the men.

Q. The number of men is determined elsewhere?
A. Yes, sir.
Q. Now, you say that Mr. Miller determined the number of men—that is, you got information from him of the number of men you were to detail over there?
A. Yes, sir.
207 Q. Do you know whether or not, before you got that information from Mr. Miller, he had had any conference with Superintendent O'Connor or Colonel Boylan about the matter?
A. Really, I don't know what his conferences were with those gentlemen at all.
Q. When Mr. Miller spoke to you about men, is it not a fact also that he would get your advice as to the men that would be necessary?
A. Yes, sir; he would always consult me. There never was any disagreement between us as to the amount.
Q. You and he would agree as to the number of men, and then you would detail that number of men?
A. Yes, sir.
Q. These men who were sent over there were selected by you as competent watchmen, were they?
A. Yes, sir.
Q. You had been there and over this wharf, had you not?
A. I had been, I believe, twice over there.
Q. Now, these officers whom you sent there reported to you, did they not, as to what they found out over there as to the water buckets, and as to the valves, and as to the hose, and as to the chemical apparatus for extinguishing fire?
A. Yes, sir.
Q. You said, in your direct examination, when you were over there that you observed barrels of water. They were placed, were they not, on the front of that wharf and not the rear of that wharf, at every upright post?
A. I didn't go over the whole wharf, but where I went along on the front (and my business took me to the front) I saw on the front part of every post these buckets.
Q. At every post?
A. Yes, sir.
Q. And each filled with water when you were there?
A. Yes, sir.
Q. And one bucket or two buckets to the barrel?
A. I don't think I remember all that. There may have been two, but there were buckets, or a bucket, at each post, and there were barrels there.
Q. Do you remember this, that these pails were hanging by the barrels, ready to be lifted out, filled with water?
A. Yes, sir.
208 Q. And also that the posts had hanging something resembling a bucket, with a chemical fire-extinguisher?
A. The Worcester, or whatever you call them; chemical pails.
Q. The hydrants you didn't count?

A. Don't know anything about them.

Q. But you saw some on the wharf?

A. Saw some hose there.

Q. Saw some hose there that was connected with the pipes and barrels?

A. Well, that—I didn't look as to that.

Q. Do you remember during the time that you were detailing men at Westwego, your officers reported the condition, not only of the valves and the chemical apparatus, but also of the hose and hydrants?

A. They made reports, but my recollection now, in regard to the number of barrels or the number of hydrants, is dim.

Q. Wasn't it a part of your instructions to these men to report to you as a part of the information they were to report, whether or not these barrels were kept filled with water?

A. Had instructions to that effect.

Q. You say, Captain, this was not within the port, of New Orleans. What do you mean by that?

A. Well, the port of New Orleans (I designate what I consider the port of New Orleans, although the customs port is a different thing). At that time, I don't believe Westwego was embraced in the customs district of New Orleans, in the revenue port. Congress stipulates what shall be the port of New Orleans for the purpose of revenue.

Q. And that is what you mean by saying that it was not within the city of New Orleans?

A. It was not within the limits of the city of New Orleans.

Q. It was a regular loading place for vessels, was it not?

A. Yes, sir.

Q. Now, you were inquired of as to the exposure at Westwego. There are no houses near Westwego, are there?

A. No, sir.

Q. No population near there?

209 A. No, sir; that is, what I call "near." You mean, immediately adjoining?

Q. Yes; not within a quarter or half a mile?

A. Oh, yes, sir; the Westwego wharf was situated over the water, away from the levee embankment; and most of the property situated over there was on the inside of the embankment, away from the wharf.

Q. The nearest house was a quarter of a mile?

A. No, sir; I suppose about a distance of —. I think there is a bar-room right across the levee from there. That is at least two or three hundred feet away from the sheds. Across in the woods. It is a single house surrounded with a growth of trees. I have never been inside of it, but I always understood it was used as a dwelling-house. Then the nearest other houses are down near the canal, a little company store or a canal store, where the boat lands, and that comprises maybe half a dozen cabins. That is almost a quarter of a mile away. It is not in the line of travel from or to any place, except wagons going up and down, from one plantation to another. And they would be behind the embankment.

Plaintiffs' counsel reads from the deposition as follows:

Redirect examination by Mr. CLEVELAND:

Q. You saw chemical pails on each post?
A. Yes, sir.
Q. Do you recollect that, Captain McArdle?
A. Yes, sir; I remember seeing the chemical pails or buckets.
Q. Did you examine the buckets?
A. No, sir.
Q. How did you know they were chemical buckets?
A. From appearances.
Q. How many did you see?
A. I don't know.
Q. Will you say there was one?
A. Yes, sir.
210 Q. Will you say you saw a single chemical bucket anywhere at Westwego?
A. If I remember right; I couldn't positively swear on that point.
Q. That is what you are here for, Captain, to swear to what you say. Do you understand it that way?
A. I couldn't swear positively about that, but I think I did; I ain't sure.
Q. And how many did you see?
A. I don't remember that, sir.
Q. Will you swear you saw one?
A. I don't remember; I won't swear positively to that.
Q. Will you swear you saw two?
A. No, sir.
Q. Did you count them?
A. No, sir.
Q. Was it any part of your business, at that time, to look into them?
A. No, sir.
Q. Then will you state, Captain McArdle, that there was, at any time, or that you saw at any time one single chemical bucket at Westwego?
A. I think I saw them when I was passing up and down the wharf.
Q. Your attention was not called to the fire apparatus, you have stated that, Captain. Did you see any boxes on the posts?
A. No, sir.
Q. You said you saw, on your cross-examination, a barrel at every post. Did you mean that?
A. I know it.
Q. At every post?
A. Yes, sir; that I passed by.
Q. How many barrels did you see there?
A. I didn't count them; I don't know.
Q. Did you see one?
A. I saw every one.

Q. How many will you swear you saw? Did you see two? Will you swear you saw two?
A. I wouldn't swear to any particular number.
Q. But you say you would swear you saw some there?
A. Yes, sir.
Q. But how many you don't know?
A. I couldn't say.
C. Well, did you see one?
A. Yes, sir.
Q. Well, did you see three?
A. Yes, sir.
Q. Four?
A. Yes, sir.
Q. Five?
A. Yes, sir.
Q. Well, how many?
A. I can't say, sir.
211 Q. You can't say?
A. I don't know how many posts were at Westwego, so I can't say.
Q. And you say they were at every post?
A. At every post I passed by I saw a bucket.
Q. How many posts did you pass by?
A. I don't remember the number.
Q. Five?
A. Yes, sir.
Q. Ten?
A. Yes, sir; more than that.
Q. Twenty?
A. Yes, sir.
Q. Well, did you see twenty buckets?
A. Yes, sir; if I saw twenty posts I saw twenty buckets. I don't know how many posts I saw.
Q. But you remember positively there was a barrel at every post?
A. Yes, sir.
Q. Did you go and examine them carefully?
A. I passed close to them; yes, sir.
Q. You passed close by twenty barrels?
A. Yes, sir.
Q. And saw that each one was full?
A. Had water in them.
Q. How much water?
A. I don't know, sir.
Q. Full?
A. Not brimfull.
Q. Did you notice whether there were any buckets in there?
A. In barrels? No, sir; I didn't notice.
Q. Or near there?
A. At the posts there were buckets.
Q. There was a bucket hanging to the post?
A. Yes, sir.

Q. Chemical buckets?
A. Water pails.
Q. How many?
A. At each post.
Q. How high up on the post?
A. They were hanging not very high; about within reach of a man standing up.
Q. So a man would have to reach up with his hand to get a bucket about that high?
A. Yes, sir.
Q. Were the buckets on a nail?
A. I think it was hanging on a baton, if I remember right.
Q. How near this lot of hose which was stretched on the posts were these buckets?
A. I think the line of hose was stretched along inside of
212 these posts, if I remember right, sir. I remember seeing some hose there.
Q. And then the buckets were on the outside?
A. On the outside; yes, sir.

CHARLES E. SATTERLEE, called as a witness for plaintiffs, testified as follows:

Direct examination by Mr. CLEVELAND:

I am secretary and treasurer of the Texas and Pacific Railway Company. I have been secretary since 1895 and treasurer since 1882. I recollect the time of the fire at Westwego on November 12, 1894.

Q. What investigation was made of the source or origin of that fire by the railway company?
A. It was in charge—all that property was in charge of our general manager and I presume he took all the means of investigating the loss. Our general manager was L. S. Thorne. His office is in Dallas, Texas.
Q. Did he make any report on the subject?
A. Except by telegram and letter; that is all; no formal, lengthy report.
Q. Was there no report made to the directors of the defendant in relation to this fire?
A. It was announced by our president to the board, informally. I don't discover any record.
The COURT: Mr. Cleveland means a written report.
The WITNESS: No, sir; not that I know of.
Q. Nothing in writing at all, whether you call it a report, or by any other name?
A. To our board of directors?
Q. Yes.
A. No. The annual report, I think, the published annual report to the stockholders——
Q. Before we get to that—was there no report made to the directors by anybody concerning this fire?

A. Not in writing.
Q. Either as to its extent or origin, or any other feature of it?
A. Not in writing.

Q. Was there any letter written by anybody to either the
213 directors or to yourself concerning the fire?

A. Yes, sir; to me. That letter was written by L. S. Thorne.
Q. Please produce it.
A. And telegrams as well. The first letter—which had been preceded by a telegram—is dated November 11, 1894.
The COURT: That is before the fire?
The WITNESS: That is before the fire.
Mr. CLEVELAND: Let us take the first telegram. Probably the telegram came before the letter.
The COURT: Telegram with regard to the fire?
Mr. CLEVELAND: Yes, telegram with regard to the fire.
The WITNESS: This is it (producing papers).
Q. Is that whole batch in relation to the fire?
A. Yes, sir.
Q. Is it arranged in order of date?
A. Yes, sir.
Q. What is the first one there?
A. October 15, 1894.
The COURT: He has handed you those that relate to the fire, arranged in chronological order I understand. Is that so?
The WITNESS: Yes, sir.
The COURT: He has some prior to the time.
The WITNESS: The subpœna required me to produce everything prior to the fire and in the immediate vicinity of it. Mr. Thorne is now somewhere in Texas.
Q. This is the very first report that you received?
A. That is dated the date of the fire. It is the very first telegram received on the subject of the fire.
Q. It is the very first communication, the first notice you had of it, is it?
A. The first one I find on file. I believe it is the first.

Telegram marked for identification Exhibit N.

Q. What is the next document that you have?
A. November 14th (producing a paper).

214 By the COURT:

Q. Is that a telegram?
A. Yes, sir.

Telegram marked for identification Exhibit O.

By Mr. CLEVELAND:

Q. Now the next communication, telegram or letter, whichever comes in order of time?
A. I produce one dated the 13th.

Telegram marked for identification Exhibit P.
Witness produces a telegram dated November 16, 1894.
Telegram marked for identification Exhibit Q.

This is from me. I went down there. I left the city of New York to go down to New Orleans, on the 12th or 13th; on the 13th I think; right after receiving that telegram of the fire. I reached there in about two days and a half. This telegram is November 16, 1894, addressed by me to Mr. Gould, president of the road.

Q. When you got down there did you make any investigation, or direct any investigation to be made of the origin of the fire?

A. No, sir; I don't know as I did. I had charge of the insurance on the property, and hence I wished to go down and adjust, as far as possible, the loss being a very heavy one.

Q. You mean the insurance on the cotton as well as the insurance on the dock?

A. Yes, sir; the insurance on the whole property, from one end to the other. I have charge of that; have had for many years.

Q. What insurance did the company have upon the cotton?

Objected to as immaterial. Objection sustained. Exception by plaintiffs.

215 Q. Is it not a fact that the Texas and Pacific Railway Company had a common carrier's liability insurance upon all the cotton upon that dock?

Same objection, ruling and exception.

Q. Did the Texas and Pacific Railway Company have insurance upon any of this cotton against common carrier's liability?

Same objection, ruling and exception.

Q. When you went there did you see Col. Boylan?

A. I have no recollection of meeting him. I may have been introduced to him possibly, not on business, however. I don't know Mr. McArdle, his employee, at all. I don't know Captain O'Connor at all.

Q. Did you learn that Captain Boylan had ever sent to the railway company any report concerning the fire?

A. No.

Q. Do I understand you to say that you did not learn that fact, that Captain Boylan had made a report?

A. I don't know it for a fact at all. I don't know as I ever heard that he had. I have been subpœnaed to produce the reports that we received from our employees concerning the fire. I am producing them now.

Q. No, the reports of the employees, the detectives?

A. That would not come to me; that would not be in my possession.

Q. But they came to the road, didn't they? I am not addressing you on the stand as a person, but as an officer of the road, now. I am examining you as secretary and treasurer.

A. I understand that perfectly. The secretary and treasurer has

not the custody of such papers as you describe. I never saw any report, or any paper purporting to be a report of anybody who was employed on the dock that night, November 12, 1894, concerning the fire to my recollection. I never made any inquiries for any such paper to my recollection.

216 By the COURT:

Q. He means since you have received the subpœna have you made inquiry around for the papers?

A. No, sir. I have done nothing. I should not have the authority to order such papers sent to me. The president would have authority.

Q. Then you have done absolutely nothing in an attempt to produce the papers mentioned in the subpœna?

A. I have produced everything in my possession—everything in my office.

Q. You construed your authority as not extending to a request to the general manager to send up any papers to you?

A. I might request it. I could not order it. It would be merely a favor on his part. I did not venture so far as to request it. I have not communicated with him on that subject.

Q. Why have you not made an attempt to obey the subpœna?

A. The duties of a railway officer are limited; my powers are limited; and they do not go beyond their instructions, or the limits of their powers. They simply would subject themselves to a refusal, or ask as a favor to have a thing sent; that is all. I never made any request of Mr. Gould to allow me to stretch my authority so far as to request Mr. Thorne, if he had such a paper, to kindly mail it. I never read any report whatever made, or purporting to be made, or any copy of any report made, or purporting to be made, by Colonel Boylan, or by any officer of his, concerning this fire. I have no recollection of reading such a report. I understood when I got down to New Orleans that Colonel Boylan had been employed to protect this property.

Q. Employed by the defendant?

A. Employed by Colonel Wheelock, our general agent. Wheelock was general agent at that time at New Orleans.

Q. What was done in relation to the accumulation of cotton in October? I don't mean conversations, but I mean in writing, what was done, if anything, to your knowledge?

A. Nothing to my knowledge.

217 By the COURT:

Q. You don't know of your own personal knowledge that anything was done about it?

A. No, sir.

By Mr. CLEVELAND:

Q. Didn't you send a letter?

A. Yes, I wrote several.

Q. Now, let me have your first letter.

A. There is the first one (producing a paper).
Q. This is the first?
A. That is a copy of it.
Q. This is the first?
A. Yes, sir; in October.

Mr. CLEVELAND: I will offer this in evidence.

By Mr. TAGGART:

Q. This is not your letter, is it?
A. It is a copy.

Mr. CLEVELAND: We will get the letter-press copy, so as to get one step farther back. A copy of a letter-press copy might be objectionable.

The witness produces his letter-press copy book.

By Mr. CLEVELAND:

Q. You have been subpœnaed to produce all the original letters and correspondence, have you not?
A. Yes, sir.
Q. And you have not done so?
A. I have done so.
Q. You have produced copies, I understand you. You call this the original?
A. Yes.
Q. This book, which I will have marked for identification, is a book of the railway company, the letter-press copy book, kept in the ordinary run of business?
A. My book.
Q. And this is a letter-press copy of the letter which you wrote, at page 196?
A. Yes, sir.

Plaintiffs' counsel offers in evidence the letter-press copy of the letter referred to, at page 196.
Marked Exhibit R (printed *post*, at p. 289).

218 Q. Please let me have the reply that you received to this letter of October 15th.

The witness produces a paper.

Q. Is this it?
A. That is it, I believe.

Plaintiffs' counsel offers in evidence the letter referred to, dated October 19, 1894, from Mr. Thorne to Mr. Satterlee.
Marked Exhibit S (printed *post*, at p. 290).

Q. When did you next address Mr. Thorne on the subject of the accumulation of cotton at Westwego? Shall I hand you your letter book?
A. It was in response to a telegram. The next letter I find is that (producing a paper).

By the COURT:

Q. What is the date?
A. October 23d.

By Mr. CLEVELAND:

Q. No telegrams?
A. I have a telegram here from Mr. Thorne.
Q. Suppose we have that, if it precedes in date.
A. October 21st (producing a telegram).

Plaintiffs' counsel offers the telegram in evidence.
Marked Exhibit T (printed *post*, at p. 291).

The WITNESS: On the 20th was a letter.

Plaintiffs' counsel offers in evidence the letter dated October 20th from Thorne to Satterlee.
Marked Exhibit U (printed *post*, at p. 292).

Mr. Thorne was general manager.
Q. Now the next one.
A. I have my letter to Thorne (producing a paper) in reference to accumulation; and I have his telegram here. That is the
219 telegram (producing a telegram). The telegram comes first.

Plaintiffs' counsel offers in evidence a telegram dated November 6, 1894, from Mr. Thorne to Mr. Satterlee.
Marked Exhibit V (printed *post*, at p. 293).

Q. You wrote on the 9th in reply to that. I have the copy here, but I would like to see the whole letter. You have only given me a copy of a part?
A. It is there (indicating in the letter-press book).

Plaintiffs' counsel offers in evidence letter dated November 9th, referred to.
Marked Exhibit W (printed *post*, at p. 293).

Q. Anything else between that and the 12th?
A. November 10th.

Mr. CLEVELAND: I will offer this telegram of November 10th from Mr. Satterlee to Mr. Thorne.
Marked Exhibit X (printed *post*, at p. 295).

Q. Did you get his reply?
A. That was what date?
Q. The 10th?
A. No, sir. That is from Thorne to me, November 10th (producing a telegram). Another one of November 10th; both bearing on the same subject.

The two telegrams referred to are offered in evidence by plaintiffs' counsel and marked Exhibits Y and Z (printed *post*, pp. 295 *et seq.*).

Q. Now, the next one?
A. A letter of November 11th (producing a paper).

Plaintiffs' counsel offers the letter in evidence.
Marked Exhibit A A (printed *post*, at pp. 297 *et seq.*).

220 THOMAS N. BOYLAN, recalled as a witness for plaintiffs testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

Q. That correspondence that we referred to, Colonel Boylan, have you that here?

A. Yes, sir.

Q. Show me, if you please, the first letter which you wrote to the Texas and Pacific Railway Company in September, 1894.

A. There are no letters in relation to Westwego in September, 1894.

Q. Give me now the date of your first letter in October, 1894, to the Texas and Pacific Railway Company?

A. New Orleans, October 11, 1894.

Q. Now, I want the letter which you received from the Texas and Pacific Railway Company next prior to October 11, 1894?

A. I produce it.

Q. Now give me the letter received which is nearest the date of October the 7th, 1894?

A. I produce that also; here it is.

Q. The paper you now produce, dated October 29th, is a letter which you received from the Texas and Pacific Railway Company about this date?

A. Yes, sir.

The letter referred to, dated October 29, 1894, marked for identification "Plaintiffs' Exhibit No. 5," is as follows:

"NEW ORLEANS, LA., *October* 29, 1894.

"Mr. T. N. Boylan, principal Boylan's detective agency, city.

"DEAR SIR: Your communication of the 24th inst. in connection with the two bales of cotton marked 'G. O. L. D.,' being slightly damaged by fire at Westwego on October 23d, has been referred to Mr. A. L. Wilkinson, chief clerk, at Westwego wharves. From Mr. Wilkinson's reply I quote the following:

221 "'I would also state that when the fire was discovered Officer Campbell, according to his own statement, was not even in the shed, and stated to me that he had asked another officer to take care of his watch. This officer was stationed in shed No. 2. I sent for Officer Campbell immediately upon discovering the fire, and it was some little time before he arrived on the scene.'

"Have to ask that you afford full advice as regards the foregoing: also as to what steps, if any, have been taken to guard against a recurrence.

"Yours truly, C. G. MILLER,
"*Freight Agent.*"

The foregoing letter is marked Plaintiffs' Exhibit B B.

Q. Now, did you reply to that letter?

A. My reply is as follows:

"NEW ORLEANS, *October* 31, 1894.

"C. G. Miller, Esq., freight agent, T. & P. railroad, city.

"DEAR SIR: Referring to your favor of the 29th instant, in relation to Officer Campbell's report, would state that strict orders have been issued that officer will not leave cotton temporarily without first notifying your representative at Westwego. In reference to fire reports, I will see that nothing concerning your employés appear in same.

"Yours truly, THOS. N. BOYLAN, *Principal.*"

The foregoing letter is marked Plaintiffs' Exhibit C C.

Q. Will you produce, if you please, the communication of yours of the 24th instant to Mr. Miller, to which his letter of October 29th was an answer?

A. I do so, and it is as follows:

222 "NEW ORLEANS, *October* 24, 94.

"C. G. Miller, Esq., freight agent T. & P. R., city.

"DEAR SIR: Herewith please find report, dated October 23rd, 1894:

"Captain James P. McArdle reports: Officer T. M. Campbell, who is on duty at Westwego for account of the T. & P. R. R., in No. 1 shed, reports that at 4.15 p. m., two bales cotton at post 2, in shed No. 1, were discovered to be on fire by Thomas Roach and John Casey, two longshoremen, who were working there loading the British steamship British Crown. Officer Campbell was coming from the closet when the colored boy employed as a messenger in the office called to him, and he and Mr. Wilkinson, superintendent of the T. & P. R. R., and some longshoremen extinguished the fire. About twelve bales had to be removed from off that burning bale before they could throw water on them. The two bales are marked G. O. L. D., and are slightly scorched. No person had been working near the cotton that caught on fire for about a week. It had evidently been burning about half an hour before it was discovered, but no smell of fire was detected. They were at the bottom of the tier of one hundred bales, and caught on fire near the buckles. The cotton was for the Elder, Dempster line. The men who discovered the fire reside, John Casey, at the corner of Jackson and Rousseau streets, and Thomas Roach, corner of Third and Tchoupitoulas. Officer Campbell is of the opinion that the origin of the fire is incendiary. Mr. Wilkinson, superintendent of the T. & P. at Westwego, is disliked by the colored laborers employed there, on account of the way in which he swears at them whenever he tells them to do anything. On Sunday, October 21, 1894, while he was waiting for a car at the corner of Walnut and Magazine streets at 6.30 p. m., one of the T. & P. R. R. checkers asked a negro why he did

223 not go to work that day and he said he would not go with that man (Mr. Wilkinson), as he had no use for a negro and

wanted him to work twelve hours for ten. The officer thinks that some person having a grudge against Mr. Wilkinson must have tried to set the cotton on fire.

"Yours truly,

——— ———,

"*Principal*—A."

The foregoing letter is marked Plaintiffs' Exhibit D D.

Q. Now, give me your letter next in date to October 29th, received from the Texas and Pacific R. R. Co. (The witness produces one.)

A. I have no letters at all, received from the T. and P. between October 24 and November 21, 1894.

Q. Please let me see any letters. I am not asking for reports, but letters, which you or any one in your office wrote to the T. and P. between October 29, 1894, and November 13, 1894.

A. I find one, dated November 14, 1894, which is as follows:

"NEW ORLEANS, *November* 14, 1894.

C. G. Miller, Esq., freight agent T. & P. R. R., city.

DEAR SIR: Officer E. Peake who was on night duty at Westwego states that last Friday night Mr. Wilkinson, the chief clerk, fired a shot at a dog. This occurred just outside the office, and in the line of his fire were two rows of cotton, but that the office was on one side and some trucks on the other side of where he stood.

Yours truly, THOS. N. BOYLAN, *Principal*."

The foregoing letter is marked Plaintiffs' Exhibit E E.

Friday would be the ninth.

224 P. A. ROBEAU, called as a witness for plaintiffs, testified as follows:

Direct examination by Mr. CLEVELAND:

Q. Where do you reside?

A. New Orleans, sir.

Q. How long have you lived in New Orleans?

A. In 1873 I went to New Orleans.

Q. What were you doing in November, 1894?

A. I was on the Boylan force.

Q. Thomas N. Boylan's detective agency in New Orleans, you mean?

A. Yes, sir.

Q. And were you at Westwego on the night of November 12, 1894?

A. Yes, sir.

Q. How long prior to that day had you been at Westwego?

A. About 18 days.

Q. Were you a day watchman or a night watchman?

A. I was a night watchman. Excuse my accent, because I have no teeth in my mouth.

Q. Who were on duty with you as night watchmen, if anybody, on the night of the fire of November 12, 1894?

A. Peake, Schoen, Tony Valle and I.

Q. Who was Valle?

A. Private watchman for the T. & P. line.

Q. How old was Valle, do you think, at that time?

A. To my knowledge, about 19 years old. I never asked him his age.

Q. How long had you three been at that dock—you and Schoen and Peake? How long had you been night watchman before the fire? You say about 18 days?

A. Not Schoen. Schoen started, I think, the 6th of November.

Q. How many night watchmen were there there on the night of the 6th; do you recollect?

A. Yes, I think so; three on the wharf and three under the wharf.

Q. How many were there on the next night, the 7th?

A. The same; the same amount.

Q. And on the next night, the 8th?

A. We were only one under the wharf and three on top.

Q. And did that continue until the night of the 12th, the same?

A. Until the 12th.

225 Q. Then from the 8th until the 12th there were two Boylan men on the dock at night, and Valle——

A. And a private.

Q. One underneath?

A. Yes, sir.

Q. What was your beat at night?

A. Shed No. 2.

Q. That is the shed up the river?

A. Up the river.

Q. The office shed is the one below—No. 1?

A. Yes, sir.

Q. Now, I want you to state to the jury just what happened on the night of November 12th, from the time you left New Orleans until the time of the fire. State it in your own way.

A. The time I left New Orleans, or when I crossed the river? I can't tell exactly the time I left.

Q. During that time state what occurred.

A. We came to the ferry, to the Westwego ferry, between 5 and 6 o'clock, and we crossed the river. Then we went to the telephone, and I telephoned that everything was all right.

Q. Where did you telephone to?

A. Telephoned to the main office.

Q. Did you yourself telephone or somebody else?

A. I don't remember. I used to telephone and the others used to telephone, but that night I don't remember.

Q. Now go on and state what occurred.

A. After we had done telephoning, and saw everything was all right, we came to the office—I mean to the office of the shed No. 1—to take my lamp, and I went to my beat, and I met the one that

was there and I said "How is it?" He told me "All right." I took off my coat and put my lamp away. Then I came to make my rounds as usual, to see if everything was right, where my key was. About five or six minutes I was standing there, or seven minutes; I can't tell exactly. I saw the private watchman pass. In about a minute or two I heard "Fire! Fire!"

226 By the COURT:

Q. You heard the cry of fire?

A. The crying of "Fire! Fire!" I run to the woods side to see if I could see anybody, but I could not see anybody, and then I run to the river side, and then I run to the fire, and I passed through the shed to go to the woods side and I saw Valle with the hose in his hand, and he says, "Go down and open the valve."

By Mr. CLEVELAND:

Q. What did you do?

A. I went to open the valve. I could only go sideways. I couldn't hardly stand; and I found the valve wide open. Then I came back and tried to help Mr. Valle with the hose in his hand. Everything was in flames. I couldn't do anything. I tried all my might to have the water, but we could not have any water. The hose was too heavy; we couldn't do anything at all; and he says to me, "Robeau, go down and untangle the hose." I says, "I won't go down where the flame is." I kept up; that is the only thing I could do I went to the other end of my beat, and took my coat and run away.

Q. Where did you first see the light of the flame that night?

A. I was about 70 feet from the light.

Q. When you saw Valle did you first see the light of the flame?

A. I saw Valle first.

Q. When you heard "Fire! Fire!" did you recognize whose voice it was?

A. Yes, sir.

Q. Whose was it?

A. Valle's voice.

Q. And when you first saw Valle where was he?

A. On top of the cotton.

Q. Whereabouts?

A. About 12 or 15 feet high on top of the cotton.

By the COURT:

Q. Whereabouts on the wharf?

A. At the woods side.

227 By Mr. CLEVELAND:

Q. You were on the woods side?

A. Yes, sir.

Q. Where was Valle?

A. He was on the cotton.

Q. Whereabouts, with relation to the centre of the shed?

A. The fire?
Q. No; where was Valle?
A. He was about the centre of the shed, but the upper end; because the fire was about 70 or 75 feet below the upper end.
Q. When you first saw Valle what was he doing?
A. He had the hose in his hand.
Q. What was he doing with it?
A. He couldn't do nothing. When I went down there he told me to go down and open the valve; and so I went, and it was wide open.
Q. When you were down there trying this faucet, and found that it was wide open, did you see any water coming out?
A. No, not a drop. We couldn't have any water.
Q. You did not see any water when you were opening the valve?
A. Yes; I saw the pouring.
Q. Leaking, you mean?
A. Yes.
Q. When you clambered up with Valle and he had the hose in his hand, what part of the hose did he have in his hand?
A. The pipe.
Q. Was there any water coming out?
A. No, sir.
Q. What was he doing when you got up on that pile of cotton?
A. Tried to have water, but he couldn't have none.
Q. Was Valle on the hose?
A. Yes, and I was too; but everything was in flames; we couldn't do nothing at all.
Q. You say he said to you, "Go down and untangle that hose"?
A. Yes, sir.
Q. How do you mean go down? Where was the hose?
A. The hose was pretty near where the fire was, against the post.
Q. Against the post?
A. Yes, sir.
Q. Was it on the platform?
A. On the floor.
Q. On the floor of the platform?
A. Yes.
228 Q. On the posts? How high up from the floor of the dock?
A. The hose?
Q. Yes.
A. The hose was about six feet high.
Q. What did you do when you got up with Valle?
A. Tried to pull out the hose to have the water to extinguish the fire, but we could not. Everything was in flames.
Q. When did you first see the flames that night? Before you got up to Valle?
A. When I got on top I saw the flames.
Q. How many bales of cotton were on fire then, as you recollect it?

A. About three or four bales.
Q. No water came out of the hose?
A. No, sir.
Q. How long were you there pulling that hose, trying to untangle it?
A. Maybe two or three seconds, because we tried the best we could.
Q. Did you see any barrels of water near that place?
A. No, sir.
Q. Or any buckets?
A. No, sir.
Q. Or any fire-extinguishers?
A. No, sir.
Q. Did anybody ever tell you that there was any chemical fire-extinguishers on that dock?
A. No, sir.
Q. Did anybody ever instruct you in their use?
A. No, sir.
Q. Describe to the jury this fire? Where was it? Was it on the top of the cotton or at the bottom?
A. At the bottom of the floor.
Q. How near did you come to the flames that night, when you were nearest to them?
A. About fifteen paces.
Q. In your judgment, if you had had a sufficient stream of water——
A. We could easy put it out.
Q. Wait. In your judgment, if the water had come out of the hose that night—a full stream of water—such as the hose was able to carry, could you have extinguished the flames?
A. Yes, sir; myself alone.
Q. Your beat, you said, was No. 2 shed?
A. Yes, sir.
Q. Where was Valle's regular beat?
A. In the centre.
229 Q. Between the sheds?
A. Yes, between the two sheds.
Q. Where was Peake's beat?
A. No. 1.
Q. Was there any other employee of the railway company, except the Boylan men, at that dock at any night you were there, except Valle?
A. Yes, sir.
Q. Who? Anybody except Valle?
A. Nobody.
Q. Valle was there alone?
A. Yes; nobody.

Cross-examination by Mr. TAGGART:

Q. You had been working there about 18 days, had you?
A. About that. I can't tell exactly.

Q. And your beat was No. 2 shed, was it?
A. Yes, sir.
Q. That is, you walked around a certain time from one part of this shed to another?
A. I had to make my rounds. I had a clock to punch every hour and a half, from half past seven to half past seven.
Q. You indicated on the clock that you had made the round?
A. Yes, sir. I had the key free.
Q. At the different places?
A. Yes, sir; all around.
Q. Had you never seen any barrels on the outside of that dock along the posts in front?
A. Outside?
Q. Yes.
A. Yes.
Q. There were barrels there?
A. Yes.
Q. At each post there was a barrel?
A. Not each post.
Q. At most of the posts there was a barrel, wasn't there, and filled with water?
A. Yes, water in it.
Q. That was part of your business, to look after and report that those barrels were full, was it not?
A. Nobody told me to report.
Q. You never looked to see if those barrels were full?
A. I looked all the time. If they were not full I filled them up myself.
Q. And on the woods side, on the outside, where the posts were, there were barrels there?
A. Yes, sir.
230 Q. And buckets?
A. Yes, sir.
Q. You were asked if there were fire-extinguishers. There were buckets hanging on these posts at different places?
A. I didn't see none.
Q. You didn't see any?
A. No.
Q. Do you say you never noticed them?
A. No, sir; I never seen one.
Q. There were gangways, were there not, running across this No. 2 shed from the river side to the woods?
A. Yes, about four or five.
Q. And did you walk through those?
A. Every night; that was my duty.
Q. That was part of the beat that you were required to make?
A. Yes, sir.
Q. And as you went through there you indicated on this clock at different places?
A. The clocks were all around my shed; the four corners and one in the centre. We had five keys.

Q. Five keys that you would get as you would go around?
A. Yes, sir; and sometimes before I make my punch with my key I make the round.
Q. Where did you start to make that round?
A. The lower end of the beat.
Q. And which way—up the river?
A. Up the river and then down.
Q. Did you and Valle go together?
A. No, he hadn't anything to do with that. He had the centre beat.
Q. You would go clear around the wharf?
A. Yes.
Q. And had you gone clear around that evening after you went on duty?
A. Yes, that is the first thing I do.
Q. Had you got clear around?
A. Yes, to see if everything was all right.
Q. That is, you got there at 6 o'clock, did you, and started on your round?
A. That I don't know, if I came right at 6 o'clock, but as soon as we come there we would take our places.
Q. Where were you on the wharf when you first heard this cry of fire?
A. I was about 30 feet under the shed, at the lower end.
231 Q. Towards No. 1 shed?
A. Yes.
Q. On the river side?
A. On the river side.
Q. That is out near the tug that was there?
A. About 30 or 40 feet. I can't say exactly.
Q. Were you under the shed?
A. Under the shed.
Q. Which way did you go when you heard the cry of fire?
A. My idea first was to go to the woods side to see if I could see anybody.
Q. Were you at a gangway?
A. Yes, sir.
Q. You went through that gangway then to the woods side?
A. Yes, sir.
Q. And you saw nothing?
A. I saw nothing. Then I run to the river side.
Q. Did you come back through the same gangway?
A. No, sir.
Q. You went up along the woods then?
A. I went to the upper end of my beat after I heard the noise "Fire! Fire!"
Q. Did you go clear up to the upper end?
A. Yes, sir.
Q. And you did not see any fire up there?
A. No.
Q. Then where did you go?

A. I went to the woods again. I went through the gangway, and I saw Valle.

Q. This hose he had in his hand, you say, did you?

A. He had what?

Q. He had the hose pipe in his hand, did he?

A. Yes, he had the pipe in his hand.

Q. How far was the hydrant from where he was?

A. About 10 feet; but where he was he could not see the hydrant.

Q. He could not see the hydrant?

A. He was on top of the cotton. He could not see me when I went down neither.

Q. What did you do when you went there?

A. I went there and I saw the valve was wide open.

Q. The what?

A. The valve of the pipe.

Q. And was there water in the hose?

A. Kind of water; yes, in the hose.

232 Q. It had pushed out in the hose, had it?

A. Yes, swelled up.

Q. How far had it pushed out and swelled up in the hose?

A. I didn't look. As soon as I saw it open I went to Valle to help him.

Q. What did you do to help him?

A. We tried to pull the hose free, and we couldn't do anything.

Q. The pressure of water had kinked the hose?

A. Yes, the hose was so tangled that we couldn't do anything. At the same time the blaze was going; and Valle says to me, "Go down and have it untangled." And I said, "No, I won't go, go yourself if you want to."

Q. And you run away then, did you?

A. Yes, I did. I tried to save my skin.

Q. This cotton was blazing?

A. Yes, very high.

Q. Blazing right up?

A. Yes.

Q. Blazing way up?

A. Yes.

Q. How high was it blazing when you got there?

A. About 6 feet from the floor—about.

Q. How high was the pile of cotton?

A. The cotton was piled about 15 feet high.

Q. Was it blazing along the side of that pile of cotton?

A. Yes, spread out.

Q. Spread out along the ends of the bales, was it?

A. Yes.

Q. Where was this kink in the hose—down below Valle?

A. Where the platform was?

Q. Yes.

A. About 6 feet under.

Q. You say the valve, when you tried it, was wide open?

A. Yes, sir.

Q. How far out in this hose had the water pushed out from the pipe?

A. I don't know that.

Q. Did you take hold of the hose to see?

A. With all my might, all the strength I had.

Q. And the pressure of water was so heavy that you could not straighten it out?

A. We couldn't budge it.

Q. Do you know who opened that valve?

A. I don't know.

Q. Do you know how high the fire was when that valve was opened?

A. Yes.

233 Q. How high was it when the valve was opened—when it was first opened?

The COURT: He found it open.

The WITNESS: I found it open when I got there.

Q. You don't know who opened it?

A. No, I don't know who opened it.

Q. How long were you there with Valle when you discovered this fire?

A. I never took my watch for that. I did the best I could.

Q. About how long were you there?

A. Maybe two or three seconds; I don't know.

Q. And then where did you go?

A. I went upstair- to help him.

Q. You went up on the cotton?

A. On the cotton.

Q. How long were you there with him?

A. Maybe one or two seconds.

Q. Then where did you go?

A. I said I tried to save myself.

Q. In saving yourself, where did you go?

A. I went to the lower end of my beat and took my overcoat and ran away. I didn't stay any more.

Q. Where did you run to?

A. To the office.

Q. How long did you stay at the office?

A. That is a mighty hard thing to say. I can say about half an hour.

Q. How long was it before that fire was all over in No. 2 shed?

A. How long did the fire last?

Q. No; how long was it before the fire was spread all over the No. 2 shed?

A. About ten minutes.

Q. And about two seconds after you got there you had to run away on account of the fire, didn't you?

A. Yes.

Q. Do you know where that fire started?

A. Right in the centre of the shed; I mean up the shed, about 40 or 50 feet this side.

Q. About 40 or 50 feet south of the upper end of No. 2 shed?

A. I can't say exactly. About 70 feet, maybe. I don't know.

Q. About that far from the upper end of No. 2 shed?

A. Yes, sir.

234 Q. And in the centre of the shed, wasn't it?

A. Yes, sir.

Q. And near the bottom of a pile of cotton, wasn't it?

A. What?

Q. Was it near the bottom of the pile that it was burning?

A. At the floor, I told you, where it started.

Q. Was there a whole pile of cotton on fire?

A. When I got there I saw the light of the fire.

Q. Where did you see the light from? Where were you when you saw the light of the fire?

A. Didn't I tell you that?

Q. No, you have not.

A. Didn't I tell you I was about 70 feet from the light of the fire?

Q. Was it in a gangway that the fire was?

A. Yes, sir.

Q. Were you at the end of the gangway when you saw the light?

A. I was on the platform outside.

Q. And did you see the light down the gangway?

A. Yes, sir.

Q. How much of a fire was there then, when you saw that?

A. I couldn't tell you.

Q. You did not see the fire?

A. Yes; when I came to climb up on the cotton, Valle says to me: "Go down and open the valve."

Q. I didn't ask that. I asked how much of a fire there was?

A. I don't know.

Q. You did not see the fire?

A. I saw the light of the fire.

Q. How much light was there; was it a big light?

A. How much light was there?

Q. Yes; how much light did you see?

A. I can't say exactly how much light I saw.

Q. Did you see it over the piles of cotton?

A. No, sir; we couldn't see it.

Q. You could not see it over the piles of cotton?

A. Because I passed there, about 15 paces from the places in the gangway.

Q. When?

A. To come to Valle.

Q. And you did not see it in the other gangway, then, did you?

A. No, of course not.

235 Q. You say this blaze was about 6 feet high when you got there?

A. 6 or 7 feet high, yes.

Q. And how many bales of cotton was it covering?

A. I don't know. I saw the light of the fire.
Q. I know, but when you got there?

The COURT: When you got there to Valle?

A. Three or four bales.
Q. Had it burned the covering off the bales?
A. They were spread out.
Q. How wide was the fire; how wide was the blaze?
A. About 15 or 20 feet I should say.
Q. Was it on the end of a solid bale of cotton? Was the pile of cotton solid there that it was burning against? Do you understand that?
A. What do you mean?
Q. Was this cotton piled?
A. Yes, like that.
Q. And was it burning 15 feet high?
A. Yes, spreading.
Q. Spreading rapidly?
A. Yes.
Q. How long was it from the time you heard Valle cry "fire" until you got to Valle?
A. Maybe half a minute. I don't believe it was.

Redirect examination by Mr. CLEVELAND:

Q. You said you did not see any fire buckets. Did you see buckets with water in them?
A. Around the fire?
Q. Around outside.
A. They had buckets, yes, outside.
Q. Buckets with water in them, outside the shed?
A. Yes.
Q. On the posts outside?
A. Yes.
Q. But you did not see any fire bucket- to know them as fire buckets? You did not know that there were any fire buckets there?
A. What do you mean?
Q. I mean chemical.
A. No, sir; no, sir; no, sir. I didn't see none.
Q. No, chemical?
A. No, I never seen none.
236 Q. Mr. Taggart has asked you if the pressure of *of* water in the hose made it so heavy that you could not pull it out?
A. I couldn't pull it and I know I am a strong man.
Q. Listen to my question. When you were pulling with Valle on the hose why didn't it come up? What was the matter with it?
A. It was so badly tangled.
Q. Was there any water in it down on the platform? Did it appear full down on the platform?
A. Yes, down on the platform. You mean on the plank?

Q. At the plank?
A. Yes.
Q. But when you got up and were pulling with Valle, was the hose that was below you, 5 or 6 feet below, where it was tangled up—was it full of water?
A. I didn't look at that.
Q. You were pulling?
A. I was pulling with all my might.
Q. No water came out of the nozzle?
A. No, sir.
Q. Tell me about these gangways. Just describe to the jury the gangways that were through No. 2 shed. What kind of gangways were they?
A. They had some about 4 feet wide and some about 2 feet wide and some about 3 feet wide.
Q. How about the cotton; how was it piled up?
A. Every which way; some flat down; some headed up.
Q. How high was it piled in any place; how many tiers high?
A. About 12 or 15 feet high.
Q. And this place that you were standing, how high was that, where you were standing with Valle?
A. About 12 feet, more or less. I never measured.

(Plaintiffs rest.)

Mr. TAGGART: I move the court to direct a verdict for the defendant upon the grounds, first, that there has been no negligence proved here on the part of the defendant; and second, on the ground that there has been no connection shown between
237 any alleged negligence and the loss by fire. Upon those grounds I insist that we are entitled to the direction of a verdict in our favor.

The COURT: I will deny the motion, with leave to renew it at the close of the whole case.

Mr. TAGGART: As at present advised, your honor, we will not put in any testimony, and we renew our motion.

The COURT: You now rest and renew your motion.

Direction of a Verdict.

The COURT: In the case on trial I have gone through the testimony over night, and the cases cited, have given the matter careful attention and thought, and have reached the conclusion that the motion should be granted. In one respect only (namely certain testimony brought out by the witness Robeau) is the situation at all changed, or is there anything in addition to what was before the court in the Reiss case. The liability of the railroad company can be established only upon the showing that their negligent action brought about the disaster by which the plaintiffs' cotton was destroyed. The burden of proof is upon the plaintiff; but of course it is to be taken into consideration that his testimony has to be sought from employees and from persons connected, in one way or

other, with the defendant, in part at least; and that while the burden remains upon him, slight testimony may be sufficient—should properly be sufficient to send the case to the jury for the drawing of proper inferences from the facts proved. Nevertheless it remains that, under the theory of the law, the burden is upon him and he must show that whatever negligence the testimony might warrant the jury in inferring, was in some way connected with the catastrophe. It is in that particular that the great bulk of the testimony of the plaintiff fails to accomplish its result. For instance, it may very well be argued—this is a repetition of what I held in the
238 Reiss case; the court of appeals seems to have passed no comment upon it—that the circumstance of a locomotive being allowed to run upon the track, among this cotton, by the end of the wharf, might perhaps be sufficient to send the case to the jury, under ordinary circumstances, to determine whether that was negligence, in view of the peculiarities of cotton and its liability to become ignited, if there were anything to show that this fire was at all connected with the movement of that engine. But it appears that the engine was at one end of the dock and this fire was in the middle of the shed. So too, the suggestion about labor troubles in New Orleans, and possible criminal action on the part of dissatisfied longshoremen might be sufficient, if there were anything to connect this fire with them. There might be circumstances sufficient to connect the fire with the troubles; for instance, if it broke out in half a dozen places at once; or if at the time people were observed from the dock to be running into the woods or escaping from the water front of the dock, or something of that sort; but there is nothing of that sort here; the fire broke out in a single place, and there is nothing at all to indicate or fairly to warrant the inference that it was brought about as a consequence of arson on the part of some riotous individual. Then again there was a great quantity of cotton, an extraordinary amount. It might be insisted strongly that the plaintiff should be entitled to go to the jury on the ground that there was such a very large quantity of cotton, and no increase in the force of watchmen if it further appeared that as matter of fact the fire was not discovered until it had spread to such an extent as to make it almost hopeless to overcome it by the appliances at hand, there might be sufficient to send it to the jury to say whether the amount of watchmen was properly proportioned to the amount of territory and merchandise that they had to watch; but, on the contrary, the evidence here shows that this fire was most promptly discovered. Robeau hears the cry of fire. After that he runs
239 from where he is, just inside the shed, 30 feet perhaps from the end of it, runs to the woods side—that is, towards the shore end of the dock, and looks out in that direction, and he runs along the dock on the woods side; then he runs along and looks at the water front and then runs to where Valle is. All that takes some time. At the time he reaches Valle he finds that it is only the front of three or four bales that was ablaze. Undoubtedly at the time Valle gave his alarm of fire there was very much less than the quantity of fire that was there when Robeau got there. No

other inference is possible. Therefore it appears that, however, great was the quantity of cotton, and, however, few the number of watchmen, it nevertheless happened that this particular fire, arising we know not how, was discovered with great promptness; so that I do not see that we are entitled to say that there is a sufficient connection made between the mere circumstances that there was a great quantity of cotton and a small number of watchmen and the catastrophe of the fire, to warrant the plaintiff going to the jury. Now, in regard to stacking cotton: it appears that it was stacked so that there were a number of gangways running through, and it is asserted that the gangways were narrow, from three to four feet perhaps, in width; and there is some testimony here about the difficulty of carrying a plank through the gangway and getting it out at the end—having to lift it over the bales of cotton. I do not quite understand the bearing and force of that testimony. It might be difficult to get a thirty-foot plank out of a four-foot alley anywhere when turning a corner with it, or even out of a six-foot alley. And it appears to have been stacked close to the hydrants. But be that as it may, there is no suggestion here in the testimony that the piling up of the cotton interfered in any way with the access to the hydrant to turn the water on; because it appears that even Robeau, a large and very stout man, had only the slight difficulty of a momentary compression of his bulk in pushing through to reach the valve of the hydrant and to turn it, if it were necessary; and he found it turned on when he got there. So as to all those parts of the case which were in evidence in the Reiss case I still remain of the opinion that the facts proved are not sufficient to send the case to the jury. There remains only the additional circumstance, which is in testimony from Robeau, that the valve having been turned on, the water did not come out of the nozzle of the hose; and the explanation which he himself gives is that the hose was kinked and tangled so that the water would not flow through from the valve to the nozzle. There is nothing upon which we can infer that there was anything the matter with the tank or the supply of water, or the valve or the hose itself, or even with the place where the hose was put; and there is nothing in the testimony here to show that to stack up the hose the way it was stacked, folding it back and forth on the platform, was negligence on the part of the persons so stowing the hose. There is no evidence to show that it was. For aught that appears here that was a perfectly proper mode of stowing it. As far as we can infer what may have produced the failure of the water to go through the hose, it is apparent that the hose was thrown down, either intentionally by Valle, to get at it better, or accidentally in scrambling up to his position on the cotton—was thrown down in a pile on the platform, whereupon instead of kicking the kinks or pulling the kinks out of the coils of hose that he had there so as to give an opportunity for an unobstructed flow of water, he turned the water on first and then undertook to pull the kinks out afterwards, expecting the water to force its way through. I do not think that single circumstance, assuming that that was the way it came about, is sufficient to hold

the company to the responsibility of negligence; and therefore I have reached the conclusion which I reached and expressed, in the Reiss case, and am prepared to grant the motion.

241 Mr. CLEVELAND: I will make my motions. I ask to go to the jury on the question of negligence. That motion is denied?

The COURT: Motion denied.

Exception.

Mr. CLEVELAND: In the first place, I should have asked your honor to charge this jury that on the uncontradicted facts there is a presumption of negligence, and therefore to direct a verdict for the plaintiffs on the testimony as it stands. That your honor denies?

The COURT: Yes.

Mr. CLEVELAND: I will take an exception. Also I now ask permission to go to the jury on the question of negligence.

Motion denied. Exception.

I now ask your honor to direct a verdict for the plaintiffs on the ground that, the bill of lading not mentioning Westwego, it was a deviation from the contract to take the cotton to Westwego, and the carrier has therefore forfeited the benefit of the exemption of loss by fire contained in the bill of lading.

Motion denied. Exception.

The bill of lading not mentioning Westwego, and Westwego not being in 1894 within the geographical limits of New Orleans, and within the limits of that port as defined in section 2568 of the Revised Statutes of the United States, or in that collection district of the United States, and not having been included within the port of New Orleans under the Statutes of the United States until 1896, taking the cotton to Westwego was such a deviation by the carrier as forfeited the benefit of the exemption of loss by fire.

Motion denied. Exception.

I now ask your honor to direct a verdict for the plaintiffs, on the ground that the bill of lading not mentioning Westwego, and Westwego not being in 1894 within the geographical limits of

242 New Orleans, or within the limits of that port as defined in section 2568 of the Revised Statutes of the United States, or in that collection district of the United States, and not having been included within the port of New Orleans under the Statutes of the United States until 1896, and, there being no proof that the shipper had any actual notice of the intention of the carrier to take the cotton to Westwego, and the defendant not having shown that Westwego was within the port of New Orleans by commercial custom of such long standing, or so general or so universal or so well established as to be fairly and reasonably within the constructive knowledge of the shippers, or fairly and reasonably to be entitled to be recognized as within the port of New Orleans, for such a shipment, namely, one hundred bales of cotton, as the one in question in this suit, the defendant has forfeited the exemption in the bill of lading in relation to fire.

Motion denied. Exception.

I ask your honor to allow me to go to the jury on the question of

whether Westwego was, within the terms of the bill of lading, such a place within the port of New Orleans as the cotton could be taken to and unloaded by the defendant, or was so well known by commercial custom of such long standing, or so general or so universal, as to be fairly within the constructive knowledge of the shippers.

Motion denied. Exception.

Mr. CLEVELAND: Of course, your honor gives me my exception in each case separately?

The COURT: Oh, yes.

Mr. CLEVELAND: I now ask your honor to direct a verdict for the plaintiffs upon the following grounds: It appearing by the uncontradicted testimony that if the defendant had a right to take the cotton there, Westwego was nothing but an open platform, with open sheds, consisting of posts and roof, and that it had three railway tracks alongside of it, upon one of which the locomotive was
243 accustomed to come, and did come upon the day of the fire, and was seen to be puffing up the dock at one o'clock, or about one o'clock, on the day of the fire; and that as Westwego had no police protection and no municipal fire protection, and no fire-engine, and that, owing to the inflammable nature of the cotton, and its exceptional situation, namely, a great accumulation of cotton, of over 20,000 bales, being there; and by reason of the contract made between the defendant and the connecting carrier, Elder-Dempster & Co., under which the defendant had no right to call upon the shipper to take the cotton; and by reason of the labor trouble existing at Westwego, and the amount at risk, it being proved by the letter of Satterlee, of October 15th, that he apprehended a great risk to his company by the destruction of his property through fire there; and that 4,000 bales at the West India dock had been burned, of a valuation of $150,000; and there being 28,000 bales at that dock valued, on the same valuation, at $1,050,000; that owing to that great accumulation of value there, and owing to the fact that the defendant had had notice of the danger of having such a large amount of cotton on the dock, irrespective of its known inflammable nature; there having been a fire on the dock, in the cotton, but a week or a few days prior to the fire; that the defendant had a notoriously drunken superintendent at the dock, namely, Wilkinson, the testimony being uncontradicted that he was drunk, or pretty well loaded, as one of the witnesses expressed it, by 11 o'clock in the morning; that a special report had been made of his disorderly conduct by firing at a dog; that the negroes who were working at the dock were inimical to him on account of the way he treated them; by reason of the fact that Boylan, O'Connor and McArdle testified—they being the only protection that the company afforded to this cotton, outside of the protection of Valle, which I will speak of in a few moments—neither
Boylan, O'Connor nor McArdle having the slightest idea of
244 the value of the cotton, or the amount of cotton that was accumulated there; and Mr. Boylan and Mr. McArdle swearing that they increased the guard over the cotton, as the cotton increased, whereas the fact shows they decreased the watchmen as the cotton increased in amount; and it being uncontradicted, by the testimony

of McArdle, that the hose should have been stretched, whereas it was piled on the platform so that it was in such a condition that two men could not pull it straight, in order to let the water come out, if it could come out; and it being uncontradicted that the only protection that was given to this company by the railroad company, independent of the protection afforded by the two detectives, Robeau and Peake, on top of the dock, and Schoen below the dock, was Valle, who was a young man not shown to have had any experience, a man of only 18 or 19 years of age; in view of those uncontradicted facts I ask your honor to direct that there is a presumption of negligence against this defendant, and to direct a verdict in our favor.

Motion denied. Exception.

Mr. CLEVELAND: Now, in order that there may be no question about it, I ask generally to go to the jury on the question of negligence.

The COURT: Generally on the whole case?

Mr. CLEVELAND: Generally on the whole case; yes.

Motion denied. Exception.

Mr. CLEVELAND: Then I claim, as I did in the Reiss case, that the defendant not being a party to this bill of lading cannot claim any relief from its common-law liability by reason of any provision in the bill of lading. Your honor recollects the form of the attestation clause?

The COURT: Yes.

Motion denied. Exception.

The COURT: The motion of the defendant is granted, with an exception to the plaintiffs.

The plaintiffs are allowed a stay of sixty days to make a case.

245 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT A.

(See *ante*, p. 13.)

United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES Anderson Earle
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

DE FOUBLANQUE PENNEFATHER
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

ARTHUR BOWER FORWOOD, ERNEST HARRISON FORWOOD, and Harold Stanley Forwood
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

246 PHILIPP CORNELIUS HEINEKEN and JOHANNES VOGELSANG
against
THE TEXAS AND PACIFIC RAILWAY COMPANY,

and 39 other cases.

It is hereby stipulated between the parties hereto—

First. That the bills of lading which are marked R. T. and T. C., March 23rd, 1897, were, on the day of their respective dates, duly issued and delivered by the defendant to the shippers therein named, at the place therein stated as the place of dates.

Second. For the purposes of arriving at the value at the place of shipment, at the date of the bill of lading, of any of the cotton included in any of the forty-three (43) actions pending in this court against the Texas and Pacific Railway Company, arising out of the fire at Westwego on November 12, 1894.

The weight given on each of the bills of lading as the aggregate weight of all the bales of cotton therein stated to have been shipped, shall be divided by the number of bales of cotton therein stated to have been shipped, and the result shall be taken as the weight per bale. In case of a total loss of the cotton described in the original invoices, in possession of the plaintiffs' attorneys, the grades shall be taken to be as described in said invoices, and the value of said grades of cotton shall be determined as hereinafter set forth.

In case a portion only of the cotton in any invoice shall have been destroyed, and it is not possible to definitely identify
247 the particular bales of cotton destroyed, then the cotton destroyed shall be considered to be the lowest grade shown on the invoice on which such destroyed cotton appears.

The prices, per pound, of such grades shall be the New Orleans price current at the date of the bill of lading for such grades of cotton, less the amount of rail freight from shipping point to New Orleans, fixed and agreed for this purpose at seventy-five (75) cents

per hundred pounds, such New Orleans price current to be fixed by the secretary of the cotton exchange at New Orleans, or by the secretary of the cotton exchange at New York.

Third. That plaintiffs' attorneys shall furnish to defendant's attorneys copies of the invoices covering the four cases now on the calendar, on or before the 31st of March, and copies of invoices covering the remainder of the suits within a seasonable time thereafter, and at least four weeks before any of said cases shall be moved for trial.

Fourth. The trial of these cases shall be set for the second Monday of April, 1897, provided that the adjournment of the trial of the cases beyond the day when they are first called for trial shall not interfere with their trial on such second Monday of April, 1897.

Dated New Orleans, March 23rd, 1897.

EVARTS, CHOATE & BEAMAN,
Plaintiffs' Attorneys.

RUSH TAGGART,
Attorney for Defendant.

248 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT B.

(See *ante*, p. 13.)

Copy.

20 Feb., '95.

Export bill of lading, approved by the permanent committee on uniform bill of lading, to take effect July 1, 1893.

26 Jan., '95. Form 206 Rev.

The Sherman, Shreveport & Southern Railway Co., and Texas & Pacific R'y, and Elder, Dempster & Co. S. S. line.
(Name of fast freight line or railroad.) (Steamship or steamship line.)

Export bill lading No. F 31.
Contract S. S. S. No. 49.
T. & P. No. 73.

Received at Greenville, Texas, from H. L. Edwards & Co., the following property, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below:

This space must be reserved for use of agents at the seaboard.

Through rate—gold—per.....		£.....
Ship's proportion		£.....
Inland charges.....	£.....	.....
Advance charges.....	£.....	£.....
Total		£.....

Marks and numbers.

100 DIXO.
EDWARDS.
2440 2539.
22–318

249 *Articles.*

One hundred (100) bales of cotton.
Weight 54,063 (subject to correction).

To be carried to the port of New Orleans, La., and thence by Elder, Dempster & Co.'s S. S. line to the port of Havre, France (or so near thereto as ship may safely get, with liberty to call at any usual port of call), and to be there delivered unto order of H. L. Edwards & Co., or to their assigns (notify K. Siebert), or to another carrier on the route to destination, if beyond said port, upon payment immediately on discharge of the property, of the freight thereon, at the rate from Greenville, Texas, to Havre, France, of one hundred and seventeen (1.17) cents, United States gold currency, per one hundred pounds gross weight and advanced charges (8——), with all other charges and average, without any allowance of credit or discount; one pound sterling to be considered equal to $4.80 United States gold currency. Settlement, if in currency other than sterling, to be at current rates of valuation.

In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained, and said conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

Attention of Shippers is Called to the Act of Congress of 1851.

"Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches or gunpowder, in a ship or vessel taking cargo for divers persons on freight without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars."

Conditions.

With respect to the service until delivery at the port of New Orleans, La., it is agreed that:

1. No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto, by causes beyond its control; or by floods or by fire from any cause or wheresoever occurring; or by riots, quarantine,
250 strikes or stoppage of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet or decay; or from any cause if it be necessary or is usual to carry such property upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable despatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be carried hereunder, shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. No carrier shall be liable for differences in weight or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination, may be kept in the car, depot or place of delivery of the carrier, at the sole risk of the owner of said property, and there held subject to lien for all freight and other charges. Property taken from a station at which there is no regular appointed agent, shall be entirely at risk of owner until loaded into cars; and when received from private or other sidings, shall be at owner's risk until the cars are attached to trains.

6. No carrier hereunder will carry, or be liable in any way for, any documents, specie or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles, are indorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive, or dangerous goods, without previous full written disclosures to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

8. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be void.

9. If upon inspection it is ascertained that the articles shipped are not those described in the bill of lading, the freight
251 charges must be paid upon the articles actually shipped, and at the rates and under the rules provided for by published classifications.

10. If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed sub-

ject to the further conditions, that no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes, sea or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; or from collision, stranding or other accidents of navigation; or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have liberty to call at intermediate ports; to tow and be towed, and to assist vessels in distress, and to deviate for the purpose of saving life or property.

11. No carrier shall be liable for delay, nor in any other respect than as warehousemen, while the said property awaits further conveyance, and in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer, of the ocean line above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

12. This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien, due and payable by the steamship company.

With respect to the service after delivery at the port of New Orleans, La., it is agreed that:

The ship shall have liberty to sail with or without pilots; that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods; and in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship; that the carrier shall not be liable for loss or damage occasioned by fire from any cause or wheresoever occurring; by barratry of the master or crew; by robbers; by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; by heating, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of weight, quality, contents and value. General average payable according to York-Antwerp rules, 1890.

It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exceptions from liability contained in, the act of Congress of the United States, approved on the 13th day of February, 1893.

252 I. It is also mutually agreed that the carrier shall not be liable for articles comprised in section 4281 of the Revised Statutes of the United States, unless notice of the true character and value thereof is given and same is entered in the bill of lading.

II. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation.

III. Also, that the carrier shall have a lien on the goods for all freights, primages and charges, and also for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking, numbering, or addressing of packages or description of their contents.

IV. Also, that in case the ship shall be prevented from reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

V. Also, that the ship may commence discharge immediately on arrival and discharge continuously, the collector of the port being hereby authorized to grant a general order for discharge immediately on arrival, and if the goods be not taken by the consignee within such time as is provided by the regulations of the port of discharge, they may be stored by the carrier at the expense and risk of their owners.

VI. Also, that full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

VII. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

VIII. Also, that in the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the ship's entry at the custom-house, less all charges saved.

IX. Also, that merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage by fire and/or flood, not happening through the fault or negligence of the owner, master, agent or manager of the vessel.

X. Also, that this bill of lading, duly endorsed, be given up to the ship's consignee in exchange for delivery order.

XI. Also, that the freight prepaid will not be returned, goods lost or not lost.

XII. Also, that parcels for different consignees collected or made up in single packages addressed to one consignee, pay full freight on each parcel.

XIII. Also, that freight payable on weight is to be paid on gross weight landed from ocean steamship, unless otherwise agreed to or herein otherwise provided, or unless the carrier elects to take the freight on the bill-of-lading weight.

253 XIV. Also, it is stipulated that in case the whole or any part of the article specified herein be prevented by any cause from going in the first steamship leaving after the arrival of such articles at said port, the carrier is only bound to forward them by succeeding steamship employed in this line, or if deemed necessary by said carrier it may forward them in other steamships.

XV. Also, that the property covered by this bill of lading is subject to all conditions expressed in the approved forms of bills of lading in use by the steamship company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

In witness whereof, the agent, signing on behalf of the said The Sherman, Shreveport & Southern Railway Company, and of the said Ocean Steamship Company, or ocean steamer and her owner, severally and not jointly, hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished the others to stand void.

Dated at Greenville, Texas, this 29th day of October, 1894.

A. L. DONNER,

Agent on Behalf of Carriers Severally but Not Jointly.

Stamped across the face in red: "To be compressed."

Endorsed.

R. T.

T. C.

March 23, 1897.

H. L. Edwards & Co.

Deliver to order of the United States nat. bank for account of Greenville nat. bank. W. A. Williams, cashier.

Deliver to —— ——, without recourse upon the United States national bank New York city. H. C. Hopkins, cashier.

254 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT C.

(See *ante*, p. 14.)

No. 215. 20 Feb., '95.

Order of 24th Oct., 1894.

Invoice of 100 bales cotton, bought by H. L. Edwards & Co., Dallas, Texas, for account of Mr. K. Siebert ac. Roederer freres A. Marandi & Co.

Grade, good midg. 1⅛ in staple.
Shipped via S., S. S. R. R. and Elder, Dempster & Co. S. S. line.

Manchi, due 23 Octob., 100 @ 40 fr.

Marks.	Bales cotton.		
DIXO	100	Weighing.....	54,063
Edwards		Less 6 %.....	3,244
		50,819 lbs. @ $3\frac{9}{32}$d.....	£694.15.10
		Less freight @ 1.17 fr. 100 lbs....	131.15. 6
			£563. 0. 4

No. K 23046.

Reimbursement
Draft No. 1014 at sixty days
On Credit Haveuis Havre
Favor of ourselves for ..... Fs. 14,188.10
Insured with Ins. Co. of N. America
Certificate No. 62981 for $3,100.00

49

167

E. & O. E.
Dallas, Texas, 27 Oct., 1894.

H. L. EDWARDS & CO.,
P'r W. S. HOLBROOK.

255 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT D.

(See *ante*, p. 14.)

Form 2370.

The Texas & Pacific Railway Co.

NEW ORLEANS, LA., *Oct.* 27, 1894.

Messrs. Elder, Dempster & Co., agents Elder, Dempster & Co. S. S. line:

I have this day engaged 500 bales cotton for shipment by the Elder Dempster & Co. S. S. line, for Havre, France, at 49.21 cents per one hundred pounds, compressed cotton, account of—

Delivery unrestricted.
Contract No. 73.
Total 3,000 bales.

Yours respectfully,

E. D. & CO.
M. & R. W.
——— ———,
Agent T. & P. Railway Co.

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT D 1.

(See *ante*, page 14.)

Form 2370.

The Texas & Pacific Railway Co.

NEW ORLEANS, LA., *Oct.* 24, 1894.

Messrs. Elder, Dempster & Co., agents Elder, Dempster & Co. S. S. line:

I have this day engaged 1,000 bales cotton for shipment by
256 the Elder, Dempster & Co. S. S. line, for Havre, France, at 49.21 cents per one hundred pounds, compressed cotton, account of—

Delivery unrestricted.
Contract No. 73.
Total 2,000 bales.

Yours respectfully,

E. D. & CO.
M. & R. W.
——— ———,
Agent T. & P. Railway Co.

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT D 2.

(See *ante*, p. 14.)

Form 2370.

The Texas & Pacific Railway Co.

NEW ORLEANS, LA., *Oct.* 24, 1894.

Messrs. Elder, Dempster & Co., agents Elder, Dempster & Co. S. S. line:

I have this day engaged 1,000 bales cotton for shipment by the Elder, Dempster & Co. S. S. line, for Havre, France, at 49.21 cents per one hundred pounds, compressed cotton, account of—

Delivery unrestricted.

Contract No. 73.

Yours respectfully,

E. D. & CO.
M. & R. W.
——— ———,
Agent T. & P. Railway Co.

257 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT E.

(See *ante*, p. 14.)

United States Circuit Court, Southern District of New York.

JOHN R. CALLENDER, OTTO MAGNUS, and HENRY C. Holder *against* THE TEXAS AND PACIFIC RAILWAY COMPANY. } Action No. 2.

And thirty-two other cases.

It is hereby stipulated between the parties hereto:

First. That the defendant does not and will not raise any question as to the jurisdiction of the court herein, and that no evidence need be offered by the plaintiffs on the subject of jurisdiction or as proof of the allegations contained in paragraph numbered "first" of the complaint in the above-entitled actions and proof on the subject of jurisdiction and of said paragraph is hereby waived.

Second. That the New Orleans prices current per pound for the grades of cotton covered by the bills of lading in this action at the date of said bills and as fixed by the superintendent of the New York cotton exchange are as set forth in Schedule A hereunto annexed.

Third. That the testimony of Edward L. Sargent taken on behalf of the defendant in the action brought by John Henry Clayton and others against this defendant may be read in evidence, on
258 behalf of said defendant from the stenographer's minutes of the trial of that action, and shall be taken to be the evidence

of said Edward L. Sargent subject, however, to all objections that may be made thereto.

Dated New York, January 3, 1899.

EVARTS, CHOATE & BEAMAN,
Attorneys for Plaintiffs.

RUSH TAGGART,
Attorney for Defendant.

SCHEDULE A.

1894.	Mid.	Fully mid.	Good mid.	Fully g. mid.
Oct. 2.				6 3/16
6.			6 1/8	6 3/8
8.	5 3/4		6 1/8	6 3/8
9.	5 11/16	5 7/8		
10.		5 13/16	6	
11.	5 9/16	5 3/4	5 15/16	6 3/16
12.	5 7/16	5 5/8	5 13/16	6 1/16
13.		5 5/8	5 13/16	6 1/16
15.		5 5/8	5 13/16	6 1/16
16.			5 13/16	6 1/16
17.			5 13/16	
18.		5 9/16	5 3/4	6
19.		5 9/16	5 3/4	6
20.			5 11/16	5 15/16
22.	5 1/4	5 7/16	5 5/8	5 7/8
23.		5 15/32	5 5/8	
24.		5 15/32	5 5/8	
25.	5 5/16		5 5/8	
26.			5 9/16	
27.		5 13/32	5 9/16	
29.		5 13/32		
30.	5 1/4	5 13/32	5 9/16	
31.		5 11/32	5 1/2	
Nov. 1.		5 11/32		
2.			5 1/2	
7.			5 7/16	

For staple 1/8 to 1/4 add 1/4c. per pound.

(Here follow diagrams marked pp. 259 to 266, inclusive.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

267 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 40.)

WESTWEGO, LA., *Nov.* 1, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report, 58 cars	3,386	B/c
Received today, 36 "	1,313	"
Unloaded today, 34 "	1,692	"
On hand in cars tonight, 61 "	3,007	"
On wharf tonight	20,193	"
Del. S. S. today	1,765	"
Total receipts this season	49,154	"
" " last "	35,840	"
" increase this "	13,314	"
" delivered S. S. this season	25,286	"
Forwarded to New Orleans	668	"

Insurance report.	S. S. line.	Dest.	On cars, 61.
Through 4,331 B/c	E. D. line.	Bremen	515 B/c
" 5,375 "	"	Havre	884 "
" 4,447 "	"	Liverpool	151 "
" 3,000 "	Harrison.	"	45 "
Local 3,040			1,412 "

Cotton Ships' Report.

S. S. British Crown left wharf at 6 a. m. Her total cargo taken at the wharf is destined for Havre and consisted of 6,151 B/c and E. D. line 1 car oak lumber and E. D. line 1 car staves acc't E. D. line, five hundred fifty-nine (559) sacks C/s meal, on acc't Trufant and Co. 525 sacks C/s cake acc't Trufant and Co.

S. St. Irene took 898 B/c acc't McFadden and Bro. for Havre. Stoddard & Co. ag'ts and left wh'f at 3 p. m.

268 S. S. Hajeen took 867 B/c for Bremen acc't E. D. line.

S. S. Straits of Magellan waiting for cotton acc't McFadden & Bro. for Genoa, A. K. Miller, M. & Co. ag'ts.

S. S. Electrician expected for Liverpool cotton acc't Harrison line.

Resp'y, C. G. MILLER, *Ag't.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 40.)

WESTWEGO, LA., 11, 2, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report,	61 cars	3,007	B/c
Received today,	15 "	604	"
Unloaded today,	34 "	1,593	"
On hand in cars tonight,	42 "	2,018	"
On wharf tonight		21,405	"
Delivered S. S. today		381	"
Total receipts this season		49,758	"
" " last "		37,114	"
" increase this "		12,644	"
" delivered S. S. this season		25,667	"
For'd to New Orleans		668	"

Insurance report.		S. S. line.	Dest.	On cars, 42.	
Through	4,152	B/c E. D. line.	Bremen	562	B/c
"	5,474	" "	Havre	885	"
"	4,497	" "	Liverpool	34	"
"	3,000	" Harrison.	"	75	"
Local	4,282	" Local		462	"

269 *Cotton Ships' Report.*

S. S. Straits of Magellan waiting at wharf for Genoa cotton account McFadden and Bro. A. K. Miller M. & Co., ag'ts.

S. S. Hajeen took 381 B/c account Elder D. line for Bremen. Total receipts to date 1,248 B/c.

S. S. Electrician arrived at wharf at 7.35 a. m. and occupied outside berth opposite No. 2 shed the inside berth being taken up by S. S. Straits of Magellan. The stevedore refused to load her from this position although everything possible was done to facilitate the handling of the cotton, yet he refused to start loading and left wharf at 10.45 a. m. for Southport. This steamer was to load Liverpool cotton account of the Harrison line.

Resp'y, C. G. MILLER, *Ag't.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 40.)

WESTWEGO, LA., *Nov.* 3, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report, 42	2,018	B/c
Received today 40	1,109	"
Unloaded " 41	1,669	"
On hand in cars tonight, 41	1,458	"
On wharf tonight	21,580	"
Del'd S. S. today	1,494	"
Total receipts this season	50,867	"
" " last "		
" increase this "		
" del'd S. S. this "	27,161	"
For'd to New Orleans	668	"

270

Insurance report.	S. S. line.	Dest.	On cars.
Through 4,241 B/c	E. D. line.	Bremen	
" 6,014 "	"	Havre	1,072 B/c
" 4,497 "	"	Liverpool	254 "
" 3,000 "	Harrison.	"	120 B/c
Local 3,828			12 "

Cotton Ships' Report.

S. S. Straits of Magellan took 957 B/c for Genoa acc't McFadden & Bro.

S. S. Hajeen took 537 B/c for Bremen acc't E. D. line. Total receipts to date, 1,785 B/cotton.

Respt.,

C. G. MILLER, *Ag't.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 40.)

WESTWEGO, LA., 11, 5, '94.

Freight ag't.

Mr. C. G. Miller, ag't, New Orleans.

DEAR SIR:

Cotton Report.

On hand in cars, last report,	53 cars		2,039 B/c
Received today,	62 "		2,352 "
Unloaded "	24 "		922 "
On hand tonight,	91 "		3,469 "
On wharf "			21,122 "
Del'd S. S. today			2,110 "
Total receipts this season			54,530 "
" " last "			41,181 "
" increase this "			13,349 "
" delivered S. S. this season			29,271 "
For'd to New Orleans			668 "

271

Insurance report.		S. S. line.	Dest.	On cars, 91.
Through	6,581 B/c	E. D. line.	Havre	3,065 B/c
"	5,214 "	"	Liverpool	356 "
"	3,160 "	Harrison.	"	
"	3,916 "	E. D. line.	Bremen	48 "
Local,	2,251			

Cotton Ships' Report.

S. S. Straits of Magellan took 951 B/c for Genoa ace't McFadden & Bro., A. K. Miller, M. & Co., agents.

Total receipts to date, 1,908 B/c.

S. S. Hajeen took eleven hundred and fifty-nine (1,159) bales cotton a/c E. D. line for Bremen.

Total receipts to date 2,944 B/cotton.

Rehandled eleven cars for New Orleans.

Resp'y, C. G. MILLER, *Ag't.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 40.)

WESTWEGO, LA., 11, 6, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans.

DEAR SIR:

Cotton Report.

On hand in cars last report,	91 cars	3,469	B / c
Received today,	54 "	2,246	"
Unloaded "	13 "	549	"
On hand tonight,	132 "	5,166	"
On wharf "		19,695	"
Delivered S. S. today		1,976	"
Total receipts this season		56,776	"
" " last "		41,256	"
" increase this "		15,522	"
" delivered S. S. this season		31,247	"
For'd to New Orleans		668	"

272

Insurance report.		S. S. line.	Dest.	On cars, 132.	
Through,	6,880 B / c	Elder D. line.	Havre	3,904	B / c
"	5,416 "	"	Liverpool	672	"
"	3,060 "	Harrison.	"	37	"
"	2,871 "	E. D. line.	Bremen	533	"
"	1,461 "				

Cotton Ships' Report.

S. S. Straits of Magellan took 577 B / c acc't McFadden & Bro. for Genoa. A. K. Miller, M. & Co., agents. Total receipts to date, 2,485 B / c.

S. S. Hajeen took 1,093 B / c for Bremen, acc't E. D. line. Total receipts to date 4,037 B / cotton.

S. S. Electrician took 100 B / c for Liverpool, acc't Harrison line. This ship arrived at wharf at 1 p. m. and dropped back at 2 p. m. to elevator wharf for grain a / c Glover & O., arrived again at cotton wharf opposite #2 shed outside Straits of Magellan where she remained.

Rehandled 3 cars cotton for New Orleans.

Respec.,

C. G. MILLER, *Ag't.*

273 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 40.)

WESTWEGO, LA., 11. 7. 94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report,	132 cars	.....	5,166 B/c
Received today,	29 "	.....	1,204 "
Unloaded "	38 "	.....	1,632 "
On hand tonight,	123 "	.....	4,738 "
On wharf "		.....	20,788 "
Delivered to S. S. today		.....	1,966 "
Total receipts this season		.....	57,980 "
" " last "		.....	41,815 "
" increase this "		.....	16,165 "
" delivered S. S. this season		.....	33,213 "
For'd to New Orleans		.....	668 "

Insurance report.		S. S. line.	Dest.	On cars, 123.
Through,	7,026 B/c	E. D. line.	Havre	4,182 B/c
"	5,743 "	"	Liverpool	449 "
"	2,298 "	Harrison.	"	37 "
"	3,682 "	E. D. line.	Bremen	20 "
Local,	1,739 "	.....	.....	50 "

Cotton Ships' Report.

S. S. Straits of Magellan took 412 B/c for Genoa acc't McFadden & Bro. A. K. Miller M. & Co. ag'ts. Total receipts to date 2,897 B/cotton.

S. S. Hajeen took 692 B/c for Bremen acc't E. D. line and left wharf at 11 a. m. Her total cargo taken at these wharves consisted of 4,729 B/c.

274 S. S. Electrician took 862 B/cotton for Liverpool acc. Harrison line. Total to date, 962 B/c.

Rehandled 7 cars cotton for New Orleans.

Resp'y. C. G. MILLER, *Ag't.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 40.)

WESTWEGO, LA., 11. 8. '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report,	123 cars	.....	4,738 B/c
Received today,	27 "	.....	1,137 "
Unloaded today,	27 "	.....	1,116 "
On hand tonight,	123 "	.....	4,759 "
On wharf tonight		.....	20,900 "
Delivered S. S. today		.....	1,004 "
Total receipts this season		.....	59,117 "
" " last "		.....	42,626 "
" increase this season		.....	16,491 "
" delivered S. S. this season		.....	34,217 "
For'd to New Orleans		.....	668 "

Insurance report.		S. S. line.	Dest.	On cars, 123.
Through,	7,528 B/c	E. D. line.	Havre	4,740 B/c
"	6,152 "	"	Liverpool	19 "
"	1,431 "	Harrison.	"	
"	4,082 "	Bremen.	E. D. line	
Local.	1,707			

275 *Cotton Ships' Report.*

S. S. Straits of Magellan took 100 B/c for Genoa acc't McFadden and Bro., A. K. Miller, M. & Co., agents. Total cargo at this port consisted 2,997 B/cotton and left wharf 9 a. m.

S. S. Electrician took 904 B/cotton for Liverpool acc't Harrison line. Total to date, 1,866 B/c.

S. S. Malabar arrived at wharf at 1 p. m. for c/s cake acc't Steinhardt & Co.

Rehandled five cars for New Orleans.

Resp'y. C. G. MILLER, *Ag'nt.*

E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 40.)

WESTWEGO, LA., 11. 9, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report,	123 cars	4,759 B/c
Received today,	37 "	1,059 "
Unloaded today,	42 "	1,654 "
On hand tonight,	114 "	4,164 "
On wharf tonight		20,580 "
Delivered S. S. today		547 B/c
Total receipts this season		60,176 "
" " last "		43,520 "
" increase this season		16,656 "
" delivered S. S. this season		34,764 "
For'd to New Orleans		668 "

276	Insurance report.	S. S. line.	Dest.	On cars, 114.
Through,	8,897 B/c	E. D. line.	Havre	3,839 B/c
"	5,867 "	"	Liverpool	215 "
"	599 "	Harrison.	"	
"	3,795 "	Bremen.	E. D. line	110 "
Local,	1,422 "			

Cotton Ships' Report.

S. S. Electrician took 547 B/c for Liverpool via Harrison line. Total to date, 2,413 B/c, and left wharf at 12.30 p. m.

S. S. Malabar took 1578 sacks c/s cake, acc't Steinhardt & Co., for Copenhagen.

Rehandled 15 cars for New Orleans.

Resp'y, C. G. MILLER, *Ag't.*

277 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 40.)

WESTWEGO, LA., 11, 10, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans, La.

DEAR SIR:

Cotton Report.

On hand in cars last report, 114 cars		4,164	B/c
Received today,	18 "	589	"
Unloaded today,	8 "	274	"
On hand tonight,	124 "	4,479	"
On wharf tonight		20,854	"
Delivered S. S. today			
Total receipts this season		60,765	"
" " last "		45,033	"
" increase this "		15,732	"
" delivered S. S. this season		34,764	"
For'd to New Orleans		668	"

Insurance report.		S. S. line.	Dest.	On cars, 124.	
Through,	[redacted] B/c	E. D. line.	Havre	4,081	B/c
"	[redacted] "	"	L'pool	314	"
"	[redacted] "	Harrison.	"		
"	[redacted] "	E. D. line.	Bremen	84	"
Local.	[redacted] "				

Cotton Ships' Report.

S. S. Electrician took 1,524 sax c/s cakes for Steinhardt & Co.; total to date, 3,102 sax c/s cake.

S. S. Malabar took 3,401 sax c/s meal and 750 [redacted] acc't Steinhardt and Co.

Resp'y,

C. G. MILLER, *Ag't.*

[redacted] cars for New Orleans.

278 E. H. L., JANUARY 3, 1900. PLAINTIFFS' EXHIBIT H.

(See *ante*, p. 40.)

WESTWEGO, LA., 11, 12, '94.

Freight agent.

Mr. C. G. Miller, agent, New Orleans.

DEAR SIR:

Cotton Report.

On hand in cars last report,	145 cars	5,245 B/c
Received today,	65 "	2,760 "
Unloaded "	0 "	0 "
On hand tonight,	206 "	8,005 "
On wharf "		20,879 "
Delivered S. S. today		0 "
Total receipts this season		64,316 "
" " last "		48,021 "
" increase this "		16,295 "
" del'd S. S. this "		34,764 "
For'd to New Orleans		668 "

Insurance report.		S. S. line.	Dest.	On cars, 206.
Through,	11,438 B/c	E. D. line.	Havre	6,726 B/c
"	5,892 "	"	Liverpool	125 "
"	599 "	Harrison.	"	25 "
"	2,700 "	E. D. line.	Bremen	100 "
Local	250 "			1,029 "

(See *ante*, p. 44.)

When the rates charged for transportation are less than tariff, the number of special authorizing such rate must be stated in the waybill.
Form 66.* 8-92-10m.

East Line & Red River railroad. W. B. No. T 70.

W. M. Giles, receiver,

Cotton Waybill. Car No. 832.

From Greenville station, Tx. div., to New Orls., Oct. 31, 1894. Via Jefferson & T. & P. Whose car, S. S. & S. Bx.

Consignor.	Consignee and destination.	Bill of lading. No. bales signed for.	Bill of lading. Date of B. L.	Bill of lading. Number of B. L.	No. bales forwarded on this W. B.	Marks and tag Nos.	Weight	Rate.	Freight.	Charges.	Prepaid.	Total to pay.
H. L. E. & Co.	Order Havre, France. N'tfy K. Siebert, Havre, France.	100	10-27	F 31	36	DINO 2369-2504	Spl. 82c. 19,476 Comp. 10 Byd. 4923	57½	112 55	C 19 48		132 03
Via	E. D. & Co. S. S. line.			[253]					Invoice wt. S. S. & S. T. & P.	Cont. 49 " 73		
										Compr'd Greenville.		

Stamped on face: "Transferred at Jefferson. Date, 11-5, 1894. Into car No. 3622. Initial, T. & P."
"Set out at Westwego."

THE TEXAS & PACIFIC RAILWAY CO. 189

T. & P.

(See *ante*, p. 44.)

When the rates charged for transportation are less than tariff, the number of special authorizing such rate must be stated in the waybill.
Form 66.* 8-92-10m.

East Line & Red River railroad. W. B. No. T 71.

W. M. Giles, receiver.

Cotton Waybill. Car No. 839.

From Greenville station, Tx. div., to New Orls., Oct. 31, 1894. Whose car, S. S. & S. Bx.
Via Jefferson & T. & P.

Consignor.	Consignee and destination.	Bill of lading. No. bales signed for.	Bill of lading. Date of B. L.	Bill of lading. Number of B. L.	No. bales forwarded on this W. B.	Marks and tag Nos.	Weight.	Rate.	Freight.	Charges.	Prepaid.	Total to pay.
H. L. E. & Co.	Order H. L. Edwards and Co., Havre, France. Notify K. Siebert, Havre, France.	100	10-27	F 31	20	DINO 2440-2468	Spl. 82c. 15,680 Comp. Byd.	5779 to 4921	80 67 [Inv. wt.] S. S. & S. T. & P.	15 68 Cont. 49 " 75 Comp'd Greenville.		106 36
	Via E. D. & Co. S. S. line.					Burnt at W. Wego, 11-12.						

Stamped across the face: "Transferred at Jefferson. Date, 11-5, 1894. Into car No. 4894. Initial, T. & P."
"Set out at Westwego."

281 E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT M FOR IDENTIFICATION.

(See *ante*, p. 182.)

NEW ORLEANS, *November 13th*, 1894.

Marshall J. Smith, city.

DEAR SIR: Herewith please find report.

November 13th, 1894.

Capt. J. P. McArdle reports: "At 6.30 o'clock last evening Corporal J. A. Boyle came to my house and notified me that there was a fire at Westwego. I at once came to the Jackson Street station and telephoned to Superintendent W. J. O'Connor. He told me that he had notified Mr. C. G. Miller, agent, and Mr. Pearsall, superintendent of the T. & P. R. R. and he instructed me to notify the agents and stevedores of vessels lying at Westwego wharf and then to proceed to Westwego and meet him there.

Two steamers were at Westwego: the S. S. Malabar, Ross, Howe & Morrow, agents. I telephoned to office of Ross, How- & Morrow, agents, and could not get an answer, and Special Feeney was sent to their office with a message notifying them of the fire. I telephoned to Mr. W. P. Ross at his residence but he had just left home. I then telephoned to Mr. Chas. K. Lincoln, stevedore of the Malabar and notified him.

The S. S. Leyden, consigned to Elder Dempster & Co. was also at Westwego I telephoned to Mr. Robert Warriner, representative of Elder Dempster & Co. and was informed that Mr. Warriner had left home to go to the fire. Cabs were sent to the residence of Mr. H. Hanselman, stevedore for S. S. Leyden and for his foreman, Mr. Patrick Powers. Mr. Powers was sick and could not leave home.

282 I then proceeded to Westwego and upon arriving at Walnut Street ferry I found there Superintendent W. J. O'Connor and Superintendent Pearsall and Agent Miller of the T. & P. R. R.; also officers T. H. Campbell, George W. Weber and M. Peters, who were on duty at Westwego. The officers stated that when they left the wharf at 6.05 p. m everything was all right and about 6.15 p. m. while they were on the ferry crossing the river they saw fire break out in the middle of No. 2 shed.

Superintendent W. J. O'Connor secured a skiff and Messrs. Pearsall and Miller of T. & P. R. R., a representative of Times-Democrat and N. O. Picayune and myself were rowed across to Westwego. Sheds Nos. 1 and 2 at that time had been totally destroyed and the contents (cotton) was piled up in river and batture and was a solid mass of fire.

Four tugs were at the wharf above the elevator conveyor with leads of hose upon the wharf, throwing streams of water upon the burning cotton. The elevator employees were in the conveyor throwing water upon the end of conveyor to keep the same from

being heated and catching on fire, and they succeeded in saving the conveyor.

Supt. W. J. O'Connor telephoned to Chief Thos. O'Connor and Ass't Chief Engineer Jas. Donovan of the New Orleans fire department and told them that the T. & P. R. R. would consider it a great favor if he would lend him some hose as they had not sufficient on hand to get a stream from tugboat Napoleon to the burning cotton, and Chief Engineer O'Connor sent five lengths of hose there.

The tugboats Two Brothers and Napoleon towed the steamers Malabar and Leyden from the wharf into midstream where they anchored.

When Superintendent W. J. O'Connor was informed of the fire he telephoned to Captain Barrett of the harbor precinct and requested him to send some tugs to Westwego as there was no fire-engines there and they might succeed in saving some of the property from destruction.

283 Officer P. A. Robeau who was on duty in No. 2 shed, says that he and the private watchman for the T. & P. R. R. Antoine Valle had just left one another, and he was making a round on river side of the shed when he heard Valle call out 'fire' and he ran to where Valle was, and found fire in centre of the shed between posts 25 and 26. He tried to assist in putting out the fire but it spread rapidly and they had to get away from it. They then tried to get at the hose in the middle of the shed but had to leave on account of the heat and in a moment's time the fire had spread to the cotton in the two sheds and they had to run to get away from the fire.

Officer E. Peake who was on duty in No. 1 shed and in charge of night detail at Westwego, states that when he arrived there at 5.45 p. m. none of the laborers or clerks were there and that Mr. Wilkinson, supt. at Westwego for the T. & P. R. R. left there at 6 p. m. About 6.15 p. m. while he was patrolling No. 1 shed he saw a reflection of the fire in No. 2 shed and he ran there and found in section No. 25, Officer P. A. Robeau and Private Watchman Valle, trying to get at the hose and by hard work they got at the hose and turned on the water, but the stream was so weak that it was of no use to them. They then ran to hose in centre of shed but the fire had gained such headway that they could not stand the heat. The fire spread with great rapidity and in a few moments, the cotton in both sheds was on fire. He sent a man to Mr. Wilkinson's house to notify him of the fire.

Officer Peter Schoen, who was on duty underneath the wharf reports that he had patrolled under shed No. 1 and had gone underneath shed No. 2 and was about centre of shed when he heard a cry of 'fire' and in a few moments the cotton over him was on fire and he had to run for his life. He saw no person underneath the wharf and saw no skiff under there.

284 Antoine Valle, private watchman for T. & P. R. R. at Westwego, says that at 6.15 p. m. there was no person in the sheds except the Boylan officers and himself. He had just left Officer

P. A. Robeau at lower end of No. 2 shed and he was engaged in opening the patrol boxes for the officers to get at the keys to turn in signals for watchmen's clock. He had finished that duty and climbed on top of a pile of cotton, a habit of his, to take a look through the shed to see that everything was all right, when he saw a light between sections 25 and 26. He thought the light was from Officer Robeau's lamp and he called to Officer Robeau, and not receiving an answer, he went to see what the light was and found a bale of cotton on fire.

The bale was in the bottom tier of a pile of cotton, about 9 tiers in height. The fire was in bottom part of bale next to the planking of the wharf. The tier was close to another pile of cotton. He called to Officer Robeau and he came to his assistance, and they tried to get at the water service but it was covered with cotton and planking and he had to break a plank to get at the valve to turn the water on. In the meantime the fire had gained great headway and the stream of water from the service was too weak to be of any use and they had to abandon it. Valle says that he and Officers Peake and Robeau then tried to get the water service in centre of No. 2 shed at work but they had to abandon it on account of the heat. The fire spread in a few moments to No. 1 shed and set the cotton in that shed on fire. He saw that there was no chance of saving the shed and he went into the office at the lower end of shed and saw one of the clerks in the office, a Mr. Smith. He said to Mr. Smith 'Let us try and save the books' and he and Mr. Smith with assistance of Officer Schoen of Boylan's police, succeeded in saving the books which were taken to the office of the elevator and placed there for safety. Valle says that just after the fire started in No. 2 shed, and while he was upon the wharf in front of the
285 shed, he saw three Carrollton negroes in a skiff about 150 feet away from the wharf and he called upon them to come to his assistance and they paid no attention to him. He says that he knows they were Carrollton negroes because they rowed their boat towards Carrollton.

Baptiste Moore, colored, and another colored man whose name he does not know—both employed as laborers for T. & P. R. R. at Westwego were upon the levee and came to his assistance but they could not check the fire. The bale that caught on fire was not in any passageway but was tiered close to another pile of cotton and they had great difficulty in getting at it.

Officer Peake and Officers Robeau and Schoen were placed by Mr. Wilkinson on tugboat Alert to prevent any person from coming there in skiffs and carrying the cotton away. Mr. Sykes, representing the T. & P. R. R. was on the tug and about 11 p. m. he discovered an old white man in a skiff with a bale of cotton in tow. The man claimed that he had found the bale floating in the river. Sykes took the bale away from the man and ordered him away from there and he left.

Officers Peake, Robeau and Schoen remained on duty at Westwego until 6 o'clock this morning and then reported at Jackson Street station.

22,000 (twenty-two thousand) bales of cotton that were stowed under Nos. 1 and 2 sheds were totally destroyed together with the sheds and office in No. 1 shed. 54 (fifty-four) cars loaded with cotton that were on the tracks between the sheds and levee caught on fire and were totally destroyed.

The following-named tugs were at Westwego, pumping water upon the burning cotton: B. D. Wood, Napoleon, W. G. Wilmot, El Chico and Corsair."

Yours truly, THOS. N. BOYLAN, *Principal.*
A.

286 E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT N.

(See *ante*, p. 213.)

(*Telegram.*)

Received at the Western Union building, 195 Broadway, N. Y., Nov. 12, 1894.

Dated DALLAS, TEXAS, 12.

To C. E. Satterlee, 195 B'way, N. Y.:

Fire broke out on cotton wharf at Westwego about six ten this p. m., destroying wharf sheds about twenty-two thousand bales of cotton and forty-two cars. Watchman reports fire first discovered in No. 2 shed about middle, and when first discovered was in a blaze. Elevator had full steam up and elevator force on hand to work pumps. At this hour, nine o'clock, reported under control, and elevator and conveyor safe. Will make full report tomorrow.

L. S. THORNE.

E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT O.

(See *ante*, p. 214.)

(*Telegram.*)

Received at the Western Union building, 195 Broadway, N. Y., 2.05, Nov. 14.

NEW ORLEANS, LA., 14.

C. E. Satterlee, 195 B'way, New York:

After going over the ground pretty thoroughly this morn-
287 ing I find but little change to make in first report of fire at Westwego. The cotton wharf is entirely consumed. The six o'clock report of Monday evening showed twenty thousand eight hundred & seventy-nine bales on wharf. Fifteen hundred to two thousand bales saved—badly damaged. Forty cars were burned, containing about two thousand bales. No damage to elevator, conveyor elevator, wharf, or any property connected with the elevator. The origin of the fire is still a mystery. The day & night watch changed at six o'clock, and the fire was discovered at six twenty. Laborers that were loading steamship left the wharf at five thirty.

L. S. THORNE.

E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT P.

(See *ante*, p. 214.)

(*Telegram.*)

Received at the Western Union building, 195 Broadway, N. Y., 2.27, Nov. 13.

DALLAS, TEX., 13.

C. E. Satterlee, 195 B'way, New York:

Just reached home from New Orleans yesterday, and Mr. Fenby and I leave for New Orleans this morning. Later reports make no material change in report sent you last night of the trouble at Westwego.

L. S. THORNE.

288 E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT Q.

(See *ante*, p. 214.)

NEW ORLEANS, LA., *November* 16, '94.

George J. Gould, New York:

Have just returned from Westwego and have had a conference with Judge Howe. The loss will amount to 20,000 bales, with a possible salvage of 2,000 bales in a damaged condition. About one-half of the cotton destroyed was under bill of lading of connecting line, which contained an exemption clause against fire loss. The remainder was under our own bill of lading covering shipment of foreign cotton which contained no exemption clause. It is Judge Howe's opinion that we are not liable for the cotton covered by the bill of lading containing the exemption clause, and that we may be able to make a defense in respect to the balance under the Louisiana common carrier law, which is more favorable than that of other States. May be able to telegraph you further tomorrow.

C. E. SATTERLEE.

289 E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT R.

(See *ante*, p. 217.)

Texas and Pacific Railway Company, 197 Broadway (Western Union building).

C. E. Satterlee, sec'y & treas.

NEW YORK, *Oct. 15th*, 1894.

Export wharf—Westwego.

Mr. L. S. Thorne, third vice-pres't & gen'l mgr., Dallas, Texas.

DEAR SIR: Noting the very heavy movement of cotton during the last week, or since October 1st, please let me know the condition

at New Orleans and if it is forcing much accumulation at that point particularly on our export cotton wharf? I feel very anxious on the subject, fearing an accumulation that may expose us to great risk.

Yours truly,
(Signed) C. E. SATTERLEE,
Sec'y & Treas.

290 E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT 8.

(See *ante*, p. 218.)

El Paso route.

Texas & Pacific Railway Co.

L. S. Thorne, third vice-president and gen'l manager; J. W. Everman, ass't general manager.

On No. 31, T. C. div.

DALLAS, TEX., *Oct. 19th*, 1894.

Mr. C. E. Satterlee, secretary and treasurer T. & P. R'y Co., New York city.

DEAR SIR: Acknowledging receipt and referring to yours of the 15th, which reaches me on the road; so far, our cotton has been moving very nicely; we have not handled any cotton as yet, on open cars—in fact there would be no object in doing so, as the compresses have been kept fully supplied, and could not be further crowded, without blocking up. My last report from New Orleans showed about twenty thousand bales of cotton on hand at New Orleans and Westwego; we have had some little delay on the T. C. division, on account of the compress at Bonham being broken down, and the compress at Paris being overcrowded. The Paris compress has now commenced running night and day, which is helping out matters some. This explains, to a certain extent, the large amount of cotton that is shown on platforms on the T. C. division: last night we had fifteen hundred bales at Paris, and 1,500 bales at Bonham compress, which is included in cotton shown on platform. The first steamer in the Teche line arrived at Indian Village day before
291 yesterday, with 1,207 barrels of sugar; sugar was all transferred to cars, and moved out the same evening. Our elevator at Donaldsonville should have been in working order yesterday, and expect to commence handling sugar at that point at once. Everything is moving very smoothly, and all indications are promising for a continued heavy business. We are again needing rain very badly. It is so fearfully dry that it is a wonder we are not having more fires. A long rainy spell, as you know, would be very disastrous, but if it would rain for a day or two, it would be a blessing, at this time.

Yours very truly, L. S. THORNE.

E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT T.

(See *ante*, p. 218.)

(*Telegram.*)

Received at the Western Union building, 195 Broadway, N. Y., Oct. 21, 1894.

Dated DALLAS, TEX., 21.

To C. E. Satterlee, 165 Broadway, N. Y.:

Wrote you yesterday and day before about cotton situation at New Orleans. This morning's report shows a great improvement total amount of cotton on hand at New Orleans and Westwego being twenty-nine thousand bales with good prospects of prompt deliveries in the next few days.

L. S. THORNE.

292 E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT U.

(See *ante*, p. 218.)

(El Paso route.)

The Texas and Pacific Railroad Co.

L. S. Thorne, third vice-president and gen'l manager; J. W. Everman, ass't general manager.

DALLAS, TEX., *October 20th*, 1894.

Mr. C. E. Satterlee, secretary and treasurer, New York city.

DEAR SIR: Referring to yours of the 15th inst., making inquiries in regard to conditions at New Orleans.

I am very much surprised, on my return to the office, after a few days' trip over the eastern division, to find, on checking the reports, that the cotton on hand at New Orleans has doubled up on us in the last five or six days. We have on hand, the last report, at New Orleans and Westwego, forty-eight thousand bales of cotton, and I have taken the matter up vigorously—and am in hopes that we can force the delivery.

Yours very truly, L. S. THORNE.

293 E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT V.

(See *ante*, p. 219.)

(*Telegram.*)

Received at 313 Flatbush Ave., op. 7th Ave., Brooklyn, N. Y., Nov. 6, 1894.

Dated DALLAS, TEXAS.

To C. E. Satterlee, 18 Fisk Pl.:

The labor trouble and delay in loading vessels at New Orleans the past few days has increased. The amount of cotton on hand

undelivered our reports this morning shows about twenty-six thousand bals. of cotton at Westwego, and the same amount at New Orleans with but poor prospects for deliveries today or tomorrow, or until after the election.

L. S. THORNE.

E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT W.

(See *ante*, p. 219.)

Texas and Pacific Railway Company, 195 Broadway (Western Union building).

C. E. Satterlee, sec'y & treas.

NEW YORK, *Nov. 9th*, 1894.

Mr. L. S. Thorne, third vice-pres't and gen'l man., Dallas, Texas.

DEAR SIR: The Carnegie people inform me that the rails have been loaded in barges for some days awaiting a higher stage
294 of water, and that they expect to get them off within the next forty-eight hours. I have instructed them to ship the entire two thousand tons, considering that it was best, owing to the condition of water.

You understand, of course, that it is desirable that these rails should appear in the accounts of the present year. I would suggest further that you arrange so that all expenses connected with the improvements on the Atchfalaya River bridge or any other current work, appear in the accounts for this year, to the end that as little as possible be carried over into the new year.

I received your wire of the 6th relative to the accumulation of cotton at Westwego and on the New Orleans side, and wired you in reply asking if the shipment of domestic cotton from New Orleans could not be facilitated. As I understand it, all export cotton is detained at our Westwego wharf, and only east-bound cotton crosses the river. If such is the case, it seems to me that with the Cromwell, L. & N., and other lines ready to receive, the amount could be kept down to normal figures. The Clyde line here have complained from time to time that they were receiving no cotton from New Orleans, and asking us what we were doing with it. I note a paragraph in the papers that the sheds of the West Indian & Pacific S. S. Co., near St. James street, was consumed with 4,000 bales of cotton on the 4th, loss $150,000, which is coming pretty near our locality.

The earnings for the fourth week in October show up better than I expected and gives us the largest month in the history of the company, and November opens with equal promise. With these large earnings we should be able to make an excellent showing at the end of the year, and be able to clear up all floating debt and show a better financial condition than ever before. If we could have anticipated these large earnings, it might have been well to have done

something toward equipping our rolling stock with brakes
295 and couplers. Have you come to any decision yet in regard to the pattern of coupler you propose to use, and which air brake. The Westinghouse seems to be obtaining a victory over the New York in the courts, which, if continued, may render the New York a less desirable brake to employ.

Yours very truly,

(Signed) C. E. SATTERLEE,
Sec'y & Treas.

E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT X.

(See *ante*, p. 219.)

NEW YORK, *Nov. 10th*, 1894.

Mr. L. S. Thorne, Dallas, Tex.:

What is the situation at New Orleans. Any prospect of speedy relief. Is our cotton at Westwego exposed to rioters in any way? Please answer fully.

C. E. SATTERLEE.

E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT Y.

(See *ante*, p. 219.)

(*Telegram.*)

Received at the Western Union building, 195 Broadway, N. Y., Nov. 10.

NEW ORLEANS, 10.

C. E. Satterlee, 195 B'way, New York:

While the situation here is unsatisfactory similar conditions
296 have existed during the heavy cotton receipts each season up until about two weeks ago our cotton was moving out better than during any former season but the labor troubles is the principal cause of the accumulation we have about sixty thousand bales of cotton on hand at New Orleans and Westwego and are doing everything possible to force deliveries if the vessels due and arranged for load promptly. The accumulation should be cut down very materially in the next ten days. The present indications are more encouraging.

L. S. THORNE.

E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT Z.

(See *ante*, p. 219.)

(*Telegram.*)

Received at the Western Union building, 195 Broadway, N. Y., Nov. 10, 189–.

Dated NEW ORLEANS, LA., 10.

To C. E. Satterlee, 195 Broadway, New York:

Your message just received after going over the ground thoroughly personally wired you this morning about the situation at New Orleans. We have had no disturbances of any kind on our property and every one here thinks the situation will gradually improve. We are using every possible precaution to protect our interests.

L. S. THORNE.

297 E. H. L., JANUARY 8, 1900. PLAINTIFFS' EXHIBIT A A.

(See *ante*, p. 219.)

(El Paso route.)

The Texas and Pacific Railway Co.

L. S. Thorne, third vice-president and gen'l manager; J. W. Everman, ass't general manager.

On No. 53, N. O. div.

DALLAS, TEX., *November 11th*, 1894.

Mr. C. E. Satterlee, secretary and treasurer T. & P. R'y, New York city.

DEAR SIR: Left New Orleans this morning for Dallas; during the time I was in New Orleans, I went over the ground very thoroughly; while the situation today is no worse than it usually is at some time during each cotton season, at the same time the conditions are very unsatisfactory, and we must have relief immediately, or commence storing cotton, at such places as are most satisfactory and economical. There is a warehouse in Gretna, reached by our tracks, which I think we can lease, and there are also a number of old cotton yards and compress yards, in the city. I was around and saw the different steamship agents, and they have made all kinds of promises. If the vessels due and overdue, show up, this week, we should be in much better shape by Saturday night. The facts however, are that vessels when loading, only load from a few hundred to fifteen hundred bales per day, and it is considered a good day's delivery when we deliver five or six thousand bales per day, of cotton, even
298 with several vessels loading, and this is not sufficient to keep up with our receipts, without we turn cotton from New

Orleans. We are having no trouble with our F. O. B. cotton—you understand that the cotton that is troubling us, is export cotton, on through bills of lading. Martin, Wise and Fitzhugh have on hand on our grounds at New Orleans, this morning, about thirteen thousand bales of cotton, and about eighty car-loads in cars, but claim they have the tonnage in sight, and will reduce this amount very materially the present week. We can unload no more cotton at Westwego, until some of the cotton on hand is disposed of. There is one vessel now overdue, that will take ten or eleven thousand bales, and there is one or two steamers in addition to those, due at Westwego tomorrow. In the meantime, we expect to finish up the two vessels that are now there loading cotton-seed cake and meal.

Up until fifteen days ago, our cotton had been moving out of New Orleans in better shape than ever before, and I am satisfied, but for the labor troubles that we would have had no trouble whatever this year, notwithstanding the heavy receipts. Several vessels left New Orleans, for other ports, on account of being unable to load, and a number of vessels that were en route for New Orleans changed their destinations to other ports, however, the general opinion seems to be that there will be no further labor troubles, although no one can tell.

On receipts at New Orleans, we are ahead, this date, as compared with last year, eighty thousand bales, and over seventy thousand bales ahead of the same date of any previous season—and if the weather and conditions remain favorable, and the cotton keeps moving, we should move into New Orleans on an average of from six to eight thousand bales of cotton per day for the next thirty days. Without there is a marked improvement in the situation, I will return to New Orleans in three or four days. In the meantime, we are seeing what arrangements we can make, for storing cotton. Will regret the additional expense, but believe it best to divide the risk as much as possible, and try and secure the business while there is a show—as the present conditions will only last for a few weeks.

299

The steamer Hendricks, in the Teche line, arrived at Indian Village yesterday with two thousand barrels of sugar for New Orleans, and eighty for Dallas. We have already received from the Bayou La Fouche, and handled through our new elevator, seven thousand barrels of sugar.

Yours very truly,

L. S. THORNE.

PLAINTIFFS' EXHIBIT No. 36.

(See *ante*, p. 164.)

(Form 2370.)

The Texas & Pacific Railway Co.

NEW ORLEANS, LA., —— —, 1894.

M. —— ——, agents —— S. S. line:

I have this day engaged — bales cotton for shipment by the —— S. S. line for —— ——, at — cents per one hundred pounds compressed cotton.

Account of —— ——.

Delivery ——.

Contract No. —.

Yours respectfully,

—— ——,

Agent T. & P. Railway Co.

300 The foregoing contains all the evidence offered or given on the trial of the cause, and upon the application of the plaintiffs this bill of exceptions is allowed by me and ordered to become part of the record in this cause at the term aforesaid, and to be filed *nunc pro tunc* as of the 16th day of January, 1900.

E. HENRY LACOMBE,

United States Circuit Judge.

It is hereby stipulated and agreed that the foregoing bill of exceptions contains all the evidence offered or given upon the trial of this cause and that the same may be signed by the judge, and be filed *nunc pro tunc* as of the sixteenth day of January, 1900.

Dated February 2, 1900.

EVARTS, CHOATE & BEAMAN,

Attorneys for Plaintiffs in Error.

RUSH TAGGART,

Attorney for Defendant in Error.

U. S. circuit court. Filed Feb. 2, 1900. John A. Shields, clerk.

301 Circuit Court of the United States, Southern District of New York.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER, PAUL LEON Roederer, Plaintiffs in Error.

against

THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant in Error.

Afterwards, to wit, at the same term at which the above-entitled cause was tried and judgment therein rendered, before the judges of the United States circuit court of appeals for the second circuit, at the United States court, in the Post-office building, in the borough

of Manhattan, in the city of New York, came the said plaintiffs Louis Auguste Marande, Jules Emile Roederer and Paul Leon Roederer, plaintiffs in error, by their attorneys Evarts, Choate & Beaman, and say, that in the records and proceedings in the said cause there is manifest error in this, to wit:

I. That the court on the trial during the examination of the witness Harris, excluded evidence offered on behalf of the plaintiffs in error, as follows:

Q. Prior to the erection of this dock, did you consider Westwego as commercially in the port of New Orleans?

A. No, sir.

302 II. That the court on the trial during the examination of the witness Fallon excluded evidence offered on behalf of the plaintiffs in error, as follows:

Q. Prior to 1893 did you consider Westwego as commercially within the port of New Orleans?

A. No, sir.

III. That the court on the trial during the examination of the witness Warriner excluded evidence offered on behalf of the plaintiffs in error, as follows:

Q. According to the custom and usage at the port of New Orleans as it existed prior to the season of 1893 and 1894, would cotton consigned to a foreign port be delivered to a ship at Westwego?

A. No.

IV. That the court on the trial during the examination of the witness Warriner excluded evidence offered on behalf of the plaintiffs in error, as follows:

Q. Prior to the erection of this dock did you consider Westwego as being commercially within the port of New Orleans?

A. We didn't know Westwego at all.

V. That the court on the trial during the examination of the witness Warriner excluded evidence offered on behalf of the plaintiffs in error, as follows:

Q. In 1893–1894 if the Texas and Pacific Railway Company had offered you for transportation on your ships less than 2,000 bales of cotton, where, by the custom of the port of New Orleans, would such cotton have been received by you?

A. In the city, in the absence of any special agreement.

303 VI. That the court on the trial during the examination of the witness Hammond excluded evidence offered on behalf of the plaintiffs in error, as follows:

Q. Prior to the erection of this dock or docks, had the Texas and Pacific Railway Company offered cotton to you for transportation on your ships, where would that cotton have been received?

A. At our wharf, or at the wharf where the steamship might be loading, in New Orleans.

VII. That the court on the trial during the examination of the witness Hammond, excluded evidence offered on behalf of the plaintiffs in error, as follows:

Q. Prior to the erection of this dock was Westwego considered commercially within the port of New Orleans?

A. No.

VIII. That the court on the trial during the examination of the witness Ross, excluded evidence offered on behalf of the plaintiffs in error, as follows:

Q. According to the customs and usages of the port of New Orleans as they existed prior to the season of 1893 and 1894, would cotton consigned to a foreign port have been delivered to the ship at Westwego?

A. Not unless by special agreement.

IX. That the court on the trial during the examination of the witness Sanders, excluded evidence offered on behalf of the plaintiffs in error, as follows:

Q. According to the custom and usage in the port of New
304 Orleans as it existed prior to the season of 1893–1894, would cotton consigned to a foreign port have been delivered to the ship at Westwego?

A. No; unless the Texas and Pacific had their wharf at Westwego. Prior to the existence of their wharf, no.

X. That the court on the trial during the examination of the witness Satterlee, after having received evidence offered on behalf of the plaintiffs in error, as follows:

Q. When you got down there (to New Orleans), did you make any investigation or direct any investigation to be made of the origin of the fire?

A. No, sir; I don't know as I did; I had charge of the insurance on the property and hence I wished to go down and adjust as far as possible, the loss being a very heavy one.

Q. You mean the insurance on the cotton as well as the insurance on the dock?

A. Yes, sir; the insurance on the whole property from one end to the other I had charge of that for it for many years.

Excluded evidence offered on behalf of the plaintiffs in error, as follows:

Q. What insurance did the company have upon the cotton?

Q. Is it not a fact that the Texas and Pacific Railway Company had a common carrier's liability insurance upon all the cotton upon that dock?

Q. Did the Texas and Pacific Railway Company have insurance upon any of this cotton against common carrier's liability?

XI. That at the conclusion of the testimony the court erred in refusing to direct a verdict for the plaintiffs in error.

305 XII. That at the conclusion of the testimony the court erred in refusing to allow the plaintiffs in error to go to the jury.

XIII. That at the conclusion of the testimony the court erred in directing a verdict for the defendant in error.

Wherefore, the plaintiffs in error pray that the judgment herein may be reversed, annulled and altogether held for nothing, and that they may be restored to all things that they have lost by occasion of the said judgment.

EVARTS, CHOATE & BEAMAN,
Attorneys for Plaintiffs in Error.

(Endorsed:) Circuit court of the United States, southern district of New York. Louis Auguste Marande and others against The Texas & Pacific Railway Co. Assignment of errors. Evarts, Choate & Beaman, 52 Wall street, New York city, attorneys for plaintiffs. U. S. circuit court. Jan. 23, 1900. John A. Shields, clerk.

306 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer *vs.* The Texas and Pacific Railway Company.	Bond for Damages and Costs.

Know all men by these presents, that we, the American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, of No. 100 Broadway, New York city, are held and firmly bound unto the above-named The Texas and Pacific Railway Company in the sum of two hundred and fifty dollars ($250) to be paid to the said The Texas and Pacific Railway Company, for the payment of which, well and truly to be made, we bind ourselves and our successors firmly by these presents.

Sealed with our seals and dated the twenty-second day of January, in the year of our Lord nineteen hundred.

Whereas, the above-named Louis Auguste Marande, Jules Emile Roederer and Paul Leon Roederer are about to prosecute a writ of error to the United States court of appeals for the second circuit to reverse the judgment rendered in the above-entitled suit by
307 the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the said Louis Auguste Marande, Jules Emile Roederer and Paul Leon Roederer shall prosecute said writ of error to effect and answer all damages and costs, if they fail to make their plea good, then this obligation shall be void; otherwise we, the above-bounden American Surety Company of New York shall do the same for them.

AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKLES, *Vice-President.*
[L. S.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

State and County of New York, *ss:*

On this 22d day of January, 1900, before me personally appeared David B. Sickels, vice-president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say: That he resided in the city of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal

affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation; that
308 the signature of said Cortland S. Van Rensselaer subscribed to the said instrument is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice-president.

K. J. PEIRCEY,
Notary Public, Kings Co.

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland and Nassau Co's.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries or one of the attorneys."

COUNTY OF NEW YORK, *ss.*

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true
309 transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 22d day of January, 1900.

[L. S.] CORTLANDT S. VAN RENSSELAER, *Attorney.*

(Endorsed:) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant of the right at any time to examine the proper officers of the surety company, under oath touching its assets, liabilities, and financial condition generally. E. Henry Lacombe, U. S. circuit judge. U. S. circuit court. Filed Jan. 23, 1900. John A. Shields, clerk.

By the Hon. E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To the Texas and Pacific Railway Company and Rush Taggart, Esquire, its attorney, Greeting:

You are hereby cited and admonished to be and appear before a United States circuit court of appeals for the second circuit, to be holden at the borough of Manhattan, in the city of New York, in the district and circuit above named, on the 15th day of February, 1900, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Louis Auguste Marande, Jules Emile Roederer and Paul Leon Roederer are plaintiffs in error, and The Texas and Pacific Railway Company is defendant in error, to show cause, if any there be, why the judgment in said writ of error men-
310 tioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 22d day of January, in the year of our Lord one thousand nine hundred, and of the Independence of these United States the one hundred and twenty-fourth.

[L. S.] E. HENRY LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States circuit court of appeals for the second circuit. Louis Auguste Marande and others, plaintiffs in error, *vs.* The Texas and Pacific Railway Company, defendants in error. Citation. Evarts, Choate & Beaman, att'ys for pl'fs in error, 52 Wall street, New York city, N. Y. Due service of a copy of the within citation is hereby admitted this 23d day of January, 1900. Rush Taggart, attorney for defendant in error. U. S. circuit court. Filed Jan. 23, 1900. John A. Shields, clerk.

311 United States Circuit Court of Appeals for the Second Circuit, October Term, 1899.

Submitted March 16, 1900; decided May 24, 1900.

Louis Auguste Marande et al., Plaintiffs in Error. *vs.* The Texas & Pacific Railway Company, Defendant in Error.	No. 149. Error to the Circuit Court of the United States for the Southern District of New York. Before Judges Wallace and Shipman.

Wallace, *Circuit Judge:*

The plaintiffs brought this action to recover the value of 65 bales of cotton, their property, which *was* destroyed by fire while in the cars of the defendant, a railway carrier, which pursuant to the terms of a bill of lading had undertaken to transport the cotton

from Greenville, Texas, to the port of New Orleans and deliver it there to a steamship carrier for transportation to Havre. By the bill of lading the defendant was not to be liable for any loss by fire, nor in any other respect than as a warehouseman while the property was awaiting further conveyance by steamship carrier. The cotton had arrived at Westwego, the terminus of a branch of the defendant's line of railway on the west bank of the Mississippi river opposite the city of New Orleans where the defendant had a wharf and customarily delivered cotton for export to the steamship carrier, but had not been unladen owing to the accumulation of cotton
312 upon the wharf when the fire occurred. There were two covered sheds upon the wharf distant from one another about 100 feet, each shed being about 250 to 300 feet long and of about the same width; and these sheds and a considerable part of the intervening space were filled with cotton in bales. The fire occurred November 12, 1894, about 6.30 p. m. It originated near the centre of shed No. 2 and was discovered immediately, but spread so rapidly that all efforts to extinguish it were unavailing, and not only the cotton upon the wharf but also that in the cars in the vicinity of the wharf was consumed.

Upon the trial the plaintiffs sought to recover upon the theory that Westwego was not a part of the port of New Orleans and because of a deviation by the carrier in taking the cotton there, contended that the exemptions of liability contained in the bill of lading did not relieve the defendant. The plaintiffs also sought to recover upon the theory that their loss was caused by the negligence of the defendant; and offered evidence in support of two issues, (1) that the cotton was exposed to danger of fire from incendiaries, and from a locomotive which during the forenoon had been on the tracks of the wharf, and (2) that the fire could have been extinguished before their cotton was burned if the defendant had provided proper appliances and exercised reasonable diligence. The trial judge directed a verdict for the defendant, and refused to submit the question of the negligence of the defendant to the jury. Error is assigned of this ruling.

We had occasion to consider the first ground of recovery in Reiss *v.* The Texas and Pacific Railway Company, an action similar to this and growing out of the same fire, and for the reasons stated in the opinion in that case do not regard it as tenable. The supplementary evidence does not change the facts or distinguish them in any material particular from those in the Reiss case.

As to the second ground of recovery, the case as to the first issue hardly merits discussion. That there were evil-disposed persons in the vicinity who might have set fire to the cotton, and that the
313 defendant by keeping a larger force of watchmen at its wharf might have more efficiently protected its property from risk, are facts that may be assumed to be proved by the evidence. But these facts did not prove or tend to prove that the fire actually was the work of an incendiary, and there was not a scintilla of evidence to prove this. On the other hand the place where it was shown the fire started raised a persuasive inference against the theory of an

incendiary origin, because it started at the most unlikely and dangerous place for the operations of an incendiary. There was not a particle of evidence to connect the locomotive with the fire. If the fire had started in the cotton which was stored in the vicinity of the locomotive, there would have been one fact of value; but it did not. It does not appear that the locomotive emitted any sparks or dropped any coals; no fact was elicited to prove that the locomotive engendered risk beyond its mere presence; and seven or eight hours had elapsed after the locomotive was taken away. The case for the plaintiffs as to the negligent origin of the fire rested wholly upon conjecture and speculation. The evidence upon the second issue, introduced for the purpose of showing that the fire should have been extinguished earlier, merely tended to prove that it could and probably would have been extinguished earlier if an employé of the defendant had not in a moment of excitement and peril failed to exercise the good judgment of a deliberate occasion. The fire started, as has been said, near the centre of the building and close by one of the three or four gangways running across the building left for access to the bales. There was a hydrant with hose attached close at hand, the hose being coiled about a post. The watchman who discovered the fire immediately ran to the hydrant, turned on the water, uncoiled part of the hose, clambered up on top of the bales, carrying the end of the hose, and directed the hose upon the fire, but the water would not run from the nozzle. Supposing he had not opened the valve, he called to another watchman who in the meantime had come to his assistance to open the valve, and the latter finding it had been opened tried to aid the first watch-
314 man in straightening out the hose. Before this could be accomplished, and in the space of a few seconds, the fire had spread so rapidly that it was beyond control. The evidence indicates that the hose had become kinked while the watchman was carrying it to the place of the fire and that the water in it made it so heavy and cumbrous that it could not be straightened out in the few seconds available so as to permit the water to escape. This probably would not have happened if the requisite length of hose to reach the fire had been unwound from the post and straightened out before the water was turned on. This, however, would have involved delay, and seconds were precious. There was a chance that what did happen would happen, but we do not think a jury would have been justified in finding that the watchman was in fault for not anticipating and providing against the contingency. He was laboring under the excitement of imminent peril, and did what any ordinarily prudent man trying to save his own property from destruction would have been likely to do under the same circumstances. The law does not exact the same measure of prudent judgment from those who have to act in the sudden emergency of a great peril as upon ordinary occasions. In Thurber *v.* Harlem, etc., R. R. Co. (60 N. Y., 336), the court declared it to be "the well-established rule that persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases," and this statement of the

law is quoted with approval in Union Pacific R. R. Co. *v.* McDonald (152 U. S., 281). See also Winn *v.* Railroad Co. (133 N. Y., 575); Bitner *v.* Crosstown Railway Co. (153 N. Y., 76); Stabenau *v.* Railroad Co. (155 N. Y., 511).

Error is assigned of the exclusion by the trial judge of evidence offered by the plaintiffs for the purpose of showing that in 1893 Westwego was not in commercial and business understanding a part of the port of New Orleans. The issue upon this branch of the case related wholly to the situation after the erection of the wharves at Westwego, and it was not claimed by the defendant that as
315 early as 1893 Westwego had been regarded as a part of the commercial port. The evidence offered would not have thrown any light upon the issue involved, and we think it was properly excluded.

We find no error in the record, and the judgment is affirmed with costs.

Treadwell Cleveland, for the plaintiffs in error.
Rush Taggart, for the defendant in error.

316 At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms, in the post-office building, in the city of New York, on the 4th day of June, one thousand nine hundred.

Present: Hon. William J. Wallace, Hon. Nathaniel Shipman, circuit judges.

LOUIS AUGUSTE MARANDE ET AL., Plaintiffs in Error,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error.

Error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said circuit court be, and it hereby is, affirmed with costs.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.

317 [Endorsed:] United States circuit court of appeals, second circuit. Louis A. Marande *vs.* Texas & Pacific R'y Co. Order for mandate. United States circuit court of appeals, second circuit. Filed Jun- 6, 1900. William Parkin, clerk.

318 United States Circuit Court of Appeals for the Second Circuit.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER, and PAUL LEON ROEDERER, Plaintiffs in Error,
against
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error.

Assignment of Errors.

Now come Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer, plaintiffs in error, and say there is error in the record and proceedings in the above-entitled matter in this, to wit:

First. That the said circuit court of appeals erred in affirming the judgment of the circuit court rendered against the plaintiffs in error and in favor of the defendant in error, upon the trial of this cause.

Second. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of this cause, during the examination of the witness Harris, in excluding evidence offered on behalf of the plaintiffs in error, as follows:

Q. Prior to the erection of this dock did you consider Westwego as commercially in the port of New Orleans?
A. No, sir.

319 Third. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of this cause, during the examination of the witness Fallon, in excluding evidence offered on behalf of the plaintiffs in error, as follows:

Q. Prior to 1898 did you consider Westwego as commercially within the port of New Orleans?
A. No, sir.

Fourth. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of this cause, during the examination of the witness Warriner, in excluding evidence offered on behalf of the plaintiffs in error, as follows:

Q. According to the custom and usage at the port of New Orleans, as it existed prior to the season of 1893 and 1894, would cotton consigned to a foreign port be delivered to a ship at Westwego?
A. No.

Fifth. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of this cause, during the examination of the witness Warriner, in excluding evidence offered on behalf of the plaintiffs in error, as follows:

Q. Prior to the erection of this dock did you consider Westwego as being commercially within the port of New Orleans?
A. We didn't know Westwego at all.

320 Sixth. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of this cause, during the examination of the witness Warriner, in excluding evidence offered on behalf of the plaintiffs in error, as follows:

Q. In 1893–1894, if the Texas and Pacific Railway Company had offered you for transportation on your ships less than 2,000 bales of cotton where, by the custom of the port of New Orleans, would such cotton have been received by you?

A. In the city in the absence of any special agreement.

Seventh. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of this cause, during the examination of the witness Hammond, in excluding evidence offered on behalf of the plaintiffs in error, as follows:

Q. Prior to the erection of this dock or docks, had the Texas and Pacific Railway Company offered cotton to you for transportation on your ships where would that cotton have been received?

A. At our wharf or at the wharf where the steamship might be loading in New Orleans.

Eighth. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of this cause, during the examination of the witness Hammond, in excluding evidence offered on behalf of the plaintiffs in error, as follows:

321 Q. Prior to the erection of this dock was Westwego considered commercially within the port of New Orleans?

A. No.

Ninth. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of this cause, during the examination of the witness Ross, in excluding evidence offered on behalf of the plaintiffs in error, as follows:

Q. According to the custom and usages of the port of New Orleans as they existed prior to the season of 1893 and 1894, would cotton consigned to a foreign port have been delivered to the ship at Westwego?

A. Not unless by special agreement.

Tenth. That the said circuit court of appeals erred in holding that the said circuit court committed no error on the trial of this cause, during the examination of the witness Sanders, in excluding evidence offered on behalf of the plaintiffs in error, as follows:

Q. According to the custom and usage in the port of New Orleans as it existed prior to the season of 1893–1894, would cotton consigned to a foreign port have been delivered to the ship at Westwego?

A. No; unless the Texas and Pacific had their wharf at Westwego. Prior to the existence of their wharf, no.

Eleventh. That the said circuit court of appeals erred in
322 holding that the said circuit court committed no error upon the trial of said cause in refusing to direct a verdict for the plaintiffs in error at the conclusion of the testimony.

Twelfth. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of said cause in refusing at the conclusion of the testimony to allow the plaintiffs in error to go to the jury on the question whether Westwego was, within the terms of the bill of lading, such a place within the port of New Orleans as the cotton could be taken to and unloaded by the defendant in error or was so well known by commercial custom of such long standing or so general or so universal as to be fairly within the constructive knowledge of the shippers.

Thirteenth. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of said cause in refusing at the conclusion of the testimony to allow the plaintiffs in error to go to the jury upon the question of the negligence of the defendant in error.

Fourteenth. That the said circuit court of appeals erred in holding that the said circuit court committed no error upon the trial of this cause in directing at the conclusion of the testimony a verdict in favor of the defendant in error.

Wherefore the plaintiffs in error pray that the judgment herein may be reversed, annulled, and altogether held for nothing,
323 and that they may be restored to all things that they have lost by occasion of the said judgment, and that a judgment in their favor may be entered, as prayed in their complaint.

EVARTS, CHOATE & BEAMAN,
Attorneys for Plaintiffs in Error,
No. 52 Wall Street, New York, N. Y.

321 [Endorsed:] United States circuit court of appeals for the second circuit. Louis Auguste Marande and o'rs, pl'tiffs in error, against The Texas & Pacific Railway Company, def't in error. Assignment of errors. Evarts, Choate & Beaman, 52 Wall street, New York city, attorneys for pl'tiffs in error. United States circuit court of appeals, second circuit. Filed Jun- 16, 1900. William Parkin, clerk. Rec'd June 12, 1900. R. W. Peckham.

325 Know all men by these presents that we, The American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, of No. 100 Broadway, New York city, are held and firmly bound unto the Texas and Pacific Railway Company in the sum of one thousand dollars ($1,000), to be paid to the said The Texas and Pacific Railway Company: for the payment of which, well and truly to be made, we bind ourselves and our successors firmly by these presents.

Sealed with our seals and dated the 11th day of June, in the year of our Lord nineteen hundred.

Whereas lately, at a term of the United States circuit court in and for the southern district of New York, at the January term, 1900, in

a suit depending in said court between Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer, plaintiffs, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the said Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer for the sum of two hundred and fifty-nine dollars and twenty-five cents; and

Whereas the said Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer obtained a writ of error from the United States circuit court of appeals for the second circuit, which court on the fourth day of June, 1900, rendered a judgment affirming said judgment in all particulars, and the said The Texas and Pacific Railway Company having sued out a writ of error from the Supreme Court of the United States, and having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to said The Texas and Pacific Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, therefore, the condition of this obligation is such that if the said Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise we, the above-bounden American Surety Company of New York, shall do the same for them.

AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKELS, *Vice-President.*
[L. S.] SAMUEL S. PERRY, *Attorney.*
(Stamp.) 75004. K. J. P.

326 STATE AND COUNTY OF NEW YORK, *ss:*

On this 11th day of June, 1900, before me personally appeared David B. Sickels, vice-president of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels further said that he was acquainted with Samuel S. Perry and knew him to be one of the attorneys of said corporation; that the signature of said Samuel S. Perry subscribed to the said instrument is in the genuine handwriting of the said Samuel S. Perry and was thereto subscribed by the like order of the said board of directors and in the presence of him the said David B. Sickels, vice-president.

K. J. PEIRCEY,
[L. S.] *Notary Public, Kings Co.*

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland, and Nassau Co's.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds, and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Samuel S. Perry, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York this 11th day of June, 1900.

[L. S.] SAMUEL S. PERRY, *Attorney.*

Approved to operate as supersedeas.

R. W. PECKHAM,
Jus. Sup. C. of U. S.

June 12, 1900.

327 American Surety Company of New York.

Incorporated April 14, 1884.

General offices, 100 Broadway.

Financial Statement, March 31, 1900.

Resources:

Real estate and improvements	$3,013,217.16
Stocks and bonds	1,348,591.75
Bills receivable	112,733.55
Cash in banks and offices	592,103.56
Premiums in course of collection	198,040.02
Accrued interest and rents	28,384.84
	$5,293,070.88

Liabilities:

Capital stock	$2,500,000.00
Surplus	1,000,000.00
Undivided profits	898,169.86
Premium reserve requirement	601,228.36
Claims in process of adjustment	257,524.06
Bills and accounts payable	36,148.60
	$5,293,070.88

328 STATE OF NEW YORK, }
County of New York, } *ss.:*

H. B. Zevely, being duly sworn, says: That he is an assistant secretary of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company, and is duly qualified to act as surety under such laws. That said company has also duly complied with and is duly qualified to act as surety under the act of Congress of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said company as rendered pursuant to section 4 of said act of Congress; that said American Surety Company of New York is worth more than $2,500,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

H. B. ZEVELY.

Subscribed and sworn before me this 11th day of June, 1900.

K. J. PEIRCEY,
Notary Public, Kings Co.

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland, and Nassau Co's.

329 [Endorsed:] Louis Auguste Marande *v.* Texas & Pacific Railway. Bond on writ of error. United States circuit court of appeals, second circuit. Filed Jun- 16, 1900. William Parkin, clerk.

330 UNITED STATES OF AMERICA, *ss.:*

To the Texas and Pacific Railway Company or Rush Taggart, Esq., its attorney of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein Louis Auguste Marande, Jules Emile Roe-

derer, and Paul Leon Roederer are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. W. Peckham, associate justice of the Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand nine hundred.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

331 [Endorsed:] U. S. Supreme Court. Louis Auguste Marande and o'rs against The Texas and Pacific Railway Company. Citation. Service of a copy of the within citation is hereby admitted. Dated New York, June 15, 1900. Rush Taggart, attorney for defendant in error. United States circuit court of appeals, second circuit. Filed Jun- 16, 1900. William Parkin, clerk.

332 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 331, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Louis Auguste Marande against The Texas & Pacific Railway Company, as the same remain of record and on file in my office.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 16th day of June, in the year of our Lord one thousand nine hundred, and of the Independence of the said United States the one hundred and twenty-fourth.

WM. PARKIN, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled. W. P.]

333 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer, plaintiffs in error, and The Texas and Pacific Railway Company, defendant in error, a manifest error hath happened, to the great damage of the

said Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer, as by their complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein
334 to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of June, in the year of our Lord one thousand nine hundred.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

June 12, 1900.

335 [Endorsed:] Supreme Court of the United States. Louis Auguste Marande and o'rs, plaintiffs in error, *vs.* The Texas and Pacific Railway Company, defendant in error. Writ of error. Service of a copy of the within writ of error is hereby admitted. Dated New York, June 15, 1900. Rush Taggart, attorney for defendant in error. United States circuit court of appeals, second circuit. Filed Jun- 16, 1900. William Parkin, clerk.

Endorsed on cover: File No., 17,803. U. S. C. C. of appeals, 2nd circuit. Term No., 318. Louis Auguste Marande, Jules Emile Roederer, and Paul Leon Roederer, plaintiffs in error, *vs.* The Texas & Pacific Railway Company. Filed June 19, 1900.

No. 318. 86

Motion to advance

Filed Mar. 15, 1901.

Office Supreme Court U. S.
FILED
MAR 15 1901
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER and PAUL LEON ROEDERER,
Plaintiffs in Error,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Defendant in Error.

No. 318.

MOTION TO ADVANCE.

And now come the plaintiffs in error and the defendant in error, and jointly move this Honorable Court to advance this cause upon the docket so that the same may be heard directly after the hearing of the cases of *Texas & Pacific Railway Company against Reiss*, No. 307, and *Texas & Pacific Railway Company against Callendar*, No. 308.

The reasons for this motion and application are as follows:

This action is brought against the Texas and Pacific Railway Company to recover damages for loss to cotton by fire occurring at the dock of this de-

fendant at Westwego, in the State of Louisiana, on November 12, 1894, and is one of thirty-two actions, including the Reiss and Callendar cases, now pending against this defendant in error to recover damages for loss of cotton by the same fire. The facts are the same in each of the cases.

Upon the trial of the Reiss case the railway company contended that the cotton in suit was awaiting further conveyance at the time of its destruction, and that by reason of a clause in the bill of lading making the liability of the carrier that of a warehouseman only, while the cotton was awaiting further conveyance, it was only liable for negligence. The trial court, however, held that the cotton was not awaiting further conveyance at the time of the fire, and, the bill of lading containing no exemption from loss by fire, that the railway company was liable as an insurer for the loss, and thereupon directed a verdict for the plaintiffs, the shippers. This action of the Circuit Court was affirmed by the Circuit Court of Appeals, and from the judgment of affirmance an appeal was taken to this Court.

Upon the trial of the Callendar case the railway company contended that the cotton had been delivered, or that in any event it was awaiting further conveyance at the time of the loss, and, the bill of lading containing an "awaiting further conveyance" clause similar to that in the Reiss case, that it was only liable, if at all, for negligence. The trial court, however, held that no delivery had been made and that, by reason of a special clause in the bill of lading expressly making the carrier liable as at common law for loss or damage to cotton by fire, the "awaiting further conveyance" clause did not operate to modify defendant's common law liability, and thereupon directed a verdict for the plaintiffs. This action of the Circuit Court was also affirmed by the Circuit Court of Appeals, and from the judgment of affirmance an appeal was taken to this Court.

In this case the bill of lading contained an express exemption from loss by fire and upon the trial the plaintiffs, the shippers, contended, as they had also contended in each of the other cases, (1) that the railway company had deviated from the usual and customary method of transportation and that, by reason thereof, it had forfeited all of the exemptions in the bill of lading contained, and (2) that the railway company was negligent.

At the conclusion of the plaintiff's case the trial court held that the railway company had not deviated from the usual and customary method of transportation, and also that no negligence had been shown, and thereupon directed a verdict for the railway company. This action of the Circuit Court was affirmed by the Circuit Court of Appeals and from the judgment of affirmance this appeal was taken to this Court.

All three of these cases arose out of the same fire and the facts are the same in each one.

Certain questions, however, are common to all of the cases, the decision of which by this Court in any one of the cases would be decisive of the others, as for instance, should this Court decide in the Callender case that a delivery had been made by the railway company, such decision would be conclusive of both the others, the facts being the same; again, should the Court decide in the Marande case that defendant had deviated from the usual and customary method of transportation and thereby forfeited the benefit of the exemptions in the bill of lading, such decision would be controlling in both the others, or should this Court in the Marande case decide that no deviation had been made, but that the plaintiffs had offered sufficient evidence to entitle them to go to the jury on the question of negligence such decision would control the action of the trial court on a new trial of the Reiss case should this Court reverse the judgment in that case and send it back for a new trial.

The grounds upon which the trial court and the

Circuit Court of Appeals based their decisions in these cases render it impracticable to argue all of the cases together as one case, but because the facts in each case are the same and because certain important questions, any one of which may be decisive of all are common to each of the cases, the counsel for both parties, in all the cases, respectfully suggest that it is proper that this case should be advanced and be heard after the hearings in cases Nos. 307 and 308, in order that the whole nature of this series of cases, and all of the questions common not only to these cases but to the remaining twenty-nine cases (none of which can be tried until the determination of these appeals by this Court) should be before this Court for consideration, at the same time.

Dated, March 14, 1901.

Respectfully submitted,

TREADWELL CLEVELAND,
Counsel for the Plaintiffs in Error.

RUSH TAGGART,
Counsel for the Defendants in Error.

No. 86.
(Mr. Cleveland for Pltf. in Error)

Office Supreme Court U. S.
FILED
NOV 27 1901
JAMES H. McKENNEY,
Clerk.

Filed Nov. 27, 1901.

Supreme Court of the United States.

October Term, 1901.
No. 86.

LOUIS AUGUSTE MARANDE, JULES EMILIE ROEDERER AND PAUL LEON ROEDERER,

Plaintiffs in Error,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

FREDERICK E. MYGATT,
GEORGE RICHARDS,
TREADWELL CLEVELAND,
Counsel for Plaintiffs in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER AND PAUL LEON ROEDERER,
Plaintiffs in error,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Defendant in error.

No. 86.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

Statement.

The writ of error in this case brings before this Court for review the action of the Circuit Court of Appeals for the Second Circuit in affirming the judgment of the Circuit Court which directed a verdict in favor of the defendant in error against the plaintiffs in error.

The action was brought by the plaintiffs in error (hereinafter called the plaintiffs) against the defendant in error (hereinafter called the defendant) to recover the value of 65 bales of cotton, part of a shipment of 100 bales, delivered to the defendant as a common carrier and destroyed, while in its possession, by the burning of its wharf at West-

wego, in the State of Louisiana, on Monday, November 12, 1894.

The defendant, by its answer, admitted the receipt of the cotton in suit and its destruction by fire at Westwego, but denied that the cotton was in its possession as a common carrier at the time of the fire.

By the terms of the bill of lading covering the cotton in suit the carrier was expressly exempted from liability for loss "by fire from any cause" (p. 170). Upon the trial, however, the plaintiffs contended (1) that the loss occurred by reason of defendant's negligence, and (2) that the defendant had deviated from the regular and usual course of carriage, and, therefore, had forfeited the benefit of all the exemptions contained in the bill of lading. At the close of the plaintiffs' case the trial court denied the motion of the defendant for the direction of a verdict in its favor, with leave to renew the same at the close of the testimony. The defendant, however, declined to put in any evidence, and renewed its motion for the direction of a verdict, which the Court thereupon granted (pp. 162, *et seq.*).

The action of the Circuit Court was affirmed by the Circuit Court of Appeals (pp. 207, *et seq.*).

Facts shown by the record.

The route of this cotton, as stated in the bill of lading, is from Greenville, Texas, "to the port of New Orleans, La., and thence by Elder, Dempster & Co.s, S. S. line to the port of Havre, France" (p. 170).

As appears from the map, Plaintiffs' Exhibit F (between pp. 178 and 179), Westwego, *a place not mentioned in the bill of lading*, is situated on the *west* bank of the Mississippi River, opposite the extreme upper end of the City of New Orleans, the river at this point being about half a mile wide. Westwego was in the Parish of Jefferson, and was not in the City of New Orleans.

It is conceded by defendant,

> "*as a matter of fact, that the east bank of the river in the City of New Orleans is the port of New Orleans, and was the port of New Orleans in* 1894 (p. 9),"

and it is also conceded

> "*that prior to March 20, 1896, Westwego was not within the designated limits of the port of entry, the customs district, as defined by the Act of Congress*" (p. 9), entitled "An Act to extend the limits of the port of entry of New Orleans," approved March 20, 1896, Vol. 29, U. S. St. at L., p. 72.

The dock and elevator of this defendant, which were practically all there was at Westwego (Miller, p. 18), were not completed until the spring of 1893 (p. 17), and prior to the building of this dock, there was nothing there but the levee (Perkins, p. 10). At the time of this fire there was only one house, a saloon (p. 112), within a quarter of a mile of the dock and only half a dozen within half a mile (Miller, p. 18). *It was an out of the way place* (McArdle, p. 135).

The town or hamlet nearest to Westwego on the west bank of the river was Amesville, about two miles below, consisting of one store, one grocery store, bar-room and two or three small houses. About three-quarters of a mile further down was a place called Harvey, consisting of two or three stores and some houses. The nearest village was Gretna, the Parish seat of Jefferson Parish, about three or three and a half miles below Westwego. A ferry ran across the river from New Orleans to a point near Westwego. This ferry was not there prior to the building of the dock, and to then get across you had to go in a rowboat. On the Gretna side of the river there was a mud road running up the river near the levee. That road ran back a little distance from the wharf.

There were only four or five policemen in the

whole parish of Jefferson, which had a frontage on that side of the river of twelve miles and on the other of eight or ten miles, and extended back from the river fifteen or twenty miles in some places. These officers were distributed over the parish, the one who covered Westwego having a beat five or six miles long (Perkins, pp. 11, 12 and 13).

Miller, defendant's main freight agent, says:

> "There were no policemen at Westwego, as I understand it" (p. 18).

There was no fire engine or volunteer or other fire department nearer than Gretna, in which there was a volunteer department (Perkins, p. 12; Miller, p. 18). The fire companies in New Orleans never crossed the river (McArdle, p. 138; Perkins, p. 14).

Defendant's Road and Terminals.

As shown by the map, Plaintiffs' Exhibit F, defendant's main line approaches New Orleans from the west at a point just back of Westwego, at which point it turns and runs in a southerly direction to Gouldsboro, which is about eight miles below Westwego (Map between pp. 158 and 159), and across the river from defendant's terminal in New Orleans (Miller, p. 14).

Defendant's only terminal for cotton prior to 1893 *was in New Orleans.*

From the point on defendant's main line nearest to Westwego (Map, Exhibit F, between pages 158 and 159), a branch or spur track extends to defendant's dock, making a distance of about half a mile.

Condition of the Dock on the Night of the Fire.

The dock at Westwego was about 800 feet long and about 300 feet wide (p. 18), and upon this dock on the night of this fire were stowed 20,879 bales of cotton (p. 26), and around or in close proximity to it there were 206 cars containing 8000 bales of cotton (p. 26).

This dock was the exclusive property of the defendant and was wholly within its power of management and control (Stipulation, p. 29).

This whole dock was of wood (p. 19), and upon it were erected two sheds, each about 250 to 300 feet long (p. 18) by 250 feet wide (p. 19), consisting simply of posts and a roof (p. 19). These sheds were open at the sides (p. 18), and had a sort of a cupola running along the centre of the roof and lengthwise of the sheds, which was also open at the sides (p. 19). The shed down the river was called No. 1 and that up the river No. 2 (p. 19). The distance between these sheds was 100 to 115 feet (p. 19). In the centre of the uncovered space between the two sheds was an opening in the floor of the dock 50 or 60 feet wide and not quite as long as the width of the sheds (p. 19), around all sides of which opening cotton was piled (p. 73).

Over the whole area covered by these two sheds the cotton was piled as high up as the men could put it; it was piled sidewise, and where there was not room to put a bale on its side it was headed or piled in any way it could be gotten in (pp. 73 and 78), and averaged eight and nine bales high (pp. 74 and 79). Cotton was piled in the same way in the space between the sheds. The only way in which a view through this dock could be had was to climb up on top of the cotton. The whole place was blocked with cotton (p. 84), and its condition was sufficient to cause Kent, a man of many years experience at cotton docks and along the levee, to say

> "In all my experience, and I have been a foreman on the levee for eighteen years, I never saw a place so jammed in my life, it was just piled almost to the roof and from one end of the shed to the other" (p. 105).

20,879 bales of cotton were crowded upon this dock, on the night of this fire (p. 26), "*an extraordinary amount*," says the Circuit Judge (p. 163), and the day before this fire Thorne, defendant's general

manager, was compelled to write to Satterlee, its treasurer:

> "We can unload no more cotton at Westwego until some of the cotton on hand is disposed of" (p. 201).

Along the rear of this dock and close to it, were two parallel tracks running the whole length of the dock (p. 19), and upon the dock itself, running its whole length, and between the sheds and the river, was another track (p. 19), on which cars were continually being switched in and out and unloaded upon the dock (pp. 74, 101).

On the day of the fire there were two vessels loading at this dock with cotton seed meal and cotton seed cake, which were on that day taken out of cars run in upon this outer track. As the cars were emptied they were hauled out and full cars hauled in in their place. This work was being done on the very day of the fire, and a locomotive passed the *Malabar*, lying at No. 1 shed, and went way up the dock.

See the testimony *passim* of Ellis, Nie, Stych, John Reinhard, William Reinhard, Lincoln and Kent (pp. 86 to 108), which shows that on the day of the fire a locomotive came on the track, passed the *Malabar* and went up the dock, hauling and pushing loaded and empty cars. It backed the train up the wharf, went up and backed down again, and was puffing and moving up on the wharf beyond the *Malabar*.

In addition to this it was the custom, just after the men knocked off work for the day, for the locomotive to haul out the empty cars and haul in full ones, so that in the morning the men on going to work would find full cars awaiting them (p. 74).

This vast mass of highly inflammable material, jammed together every which way, was the centre around and on which, on the night of this fire, this defendant saw fit to store 206 cars containing 8,005 bales of cotton (p. 26) which it was unable to unload

because of the crowded condition of its dock (p. 201), and somewhere on or near this dock the cotton in suit was kept for five days (p. 29). It was never unloaded, and when this fire broke out, it was destroyed.

The water supply on the dock came through a single pipe which ran lengthwise of the dock in the centre under the floor, from which were erected six hydrants, three in each shed (p. 18).

These hydrants were about six feet high (p. 75), and to each of them was attached a length of one hundred feet of hose (p. 18). On a post near each hydrant was a platform built around the post, about six inches higher than the hydrants, and on this platform the hose was coiled (pp. 75 and 81). *It does not appear what the force of the stream would be which would flow through these hydrants* from the pipe under the dock which was fed from a tank, some distance from the dock.

Cotton was piled all around these hydrants and around the posts on which the hose was kept and was piled higher than the hydrants and hose (pp. 75 and 81). *Sometimes the cotton would fall over and block the hose* (p. 85).

There were no gangways whatever through the cotton, running lengthwise of the sheds (p. 79) either connecting one hydrant with another or otherwise. It was therefore almost impossible to operate fire hose to advantage, or to carry or extend hose north or south from any hydrant. There were only three or four narrow gangways in each shed running crosswise of the sheds (p. 74). The gangways across the sheds were narrow, and were piled and crowded with cotton (pp. 74, 84).

NO SYLLABLE OF TESTIMONY WAS GIVEN TO SHOW THAT THE FIRE APPARATUS ON THIS DOCK WAS EVER TESTED. ON THE CONTRARY, IT APPEARS THAT, SO FAR AS MILLER, THE AGENT IN CHARGE OF THIS DOCK, KNEW, THE HOSE WAS NEVER TESTED SINCE IT WAS PUT UP WHEN THE DOCK WAS BUILT, ABOUT A YEAR AND A HALF BEFORE THE FIRE

(p. 17). THE MEN EMPLOYED ON THE DOCK NEVER SAW THE HOSE TESTED (fol. 128), NOR WAS THERE EVER ANY DRILL TO SHOW ANYONE HOW TO USE THE HOSE IN CASE OF NEED (p. 85). IT DOES NOT APPEAR THAT THE HYDRANTS OR THE HOSE WERE IN GOOD CONDITION AT ANY TIME SO AS TO PERMIT OF AN UNOBSTRUCTED FLOW OF WATER.

The hose was not kept in the usual way. The customary way of keeping hose was not to have it coiled or folded on platforms as at this dock, but to have it rolled on reels (p. 112) or stretched out, so that in case of need it would be instantly accessible (p. 135). Here the hose had to be unfolded or uncoiled and made free the whole of its length before water would flow through.

The dock itself was the private dock of this defendant, and permission had to be obtained from it before any one could go there (p. 59). It being inaccessible, if a fire once gained much headway in this mass of cotton no reasonable man could have expected any other result than the total destruction of the dock and its contents.

On October 21, Thorne had written Satterlee:

> "*It is so fearfully dry that it is a wonder we are not having more fires*" (p. 196).

The weather report, (pp. 118 and 119) shows that that condition still existed at the time of this fire.

A fire of unexplained origin had broken out on this very dock on October 23, which had evidently been burning half an hour before it was discovered (p. 150).

On the night of the fire, the sole guardians of this dock and of this enormous aggregation of valuable property, the cotton alone being worth over ONE MILLION DOLLARS, were TWO men from Boylan's detective agency who were detailed as watchmen on the floor of the dock, and ONE man from the agency as watchman UNDER the dock (pp. 120 and 152), and the *only* representative there in the permanent employment of this defendant was its own private

watchman Valle. Not one syllable of testimony is given to show that any one of these men had had any experience whatever in the handling of fire apparatus. It appears that Valle was only about nineteen years old (p. 152).

Colonel Boylan says that the number of watchmen on the dock was supposed to be increased according as the cotton increased (p. 124). That this was not the fact is expressly shown, for it appears that on the night of November 6, at which time there were only 19,695 bales on this dock (p. 183), and on November 7th, when there were 20,788 bales there (p. 184), there were five watchmen from this Detective Agency on duty, and on the night of this fire, when the amount of cotton was large beyond precedent, there were only three (pp. 120 and 121). Herzog, the agent of the Illinois Central road, says that he had at their docks at Southport at this same time, though they were much smaller and more easily guarded from fire,

> "probably 25 men, extra men, at night and perhaps one half of that number in the day time" and adds, "we had at one time as many as 14,000 bales, and at other times perhaps one-half" (p. 112).

The Fire.

The only direct testimony about the fire is that of Robeau, one of the defendant's employees, an "officer" of Boylan's detective force, who was called by the plaintiffs. His evidence is at pp. 151 to 162, and is in substance as follows:

At about half-past six in the evening of November 12, Valle, whose regular beat was between the sheds (p. 155), was for some unknown reason in shed No. 2. At that time Robeau, a large and very stout man (p. 164), the only Boylan watchman in shed No. 2, was standing at the lower end of shed No. 2, near the river side, when he heard some one cry fire. He ran to the woods side of the shed, a

distance of about 200 feet; not seeing anybody he ran back again to the river side; he then ran to the upper end of the shed, a distance of about 300 feet, still not seeing any fire. He then ran through the shed again in one of the gangways to the woods side, and then some distance from him he saw Valle in the centre of the shed, standing on a pile of cotton with the hose in his hand. Valle shouted to him to go and open the valve. He pushed in as best he might, between the piles of cotton, and reaching the valve of the hydrant, found that it was open (p. 154), and that the water had swelled the hose out for a little way, *but how far he did not notice* (p. 158), and found the water pouring, that is, leaking (p. 154).

He then climbed up by Valle but did not see the fire till he got up on the cotton to where Valle stood, and when he first saw it it covered only three or four bales of cotton (p. 155) near the floor of the dock (p. 160). For a short time, which he estimates as a few seconds, but the length of which no one can tell, he assisted Valle in attempting to pull up the hose (p. 159), which was on a platform about six feet from the floor (p. 154), the cotton on which Valle and Robean stood being piled about fifteen feet above the floor (p. 162). *They both pulled at this hose, but it was tangled so that both men together could not pull it out* (pp. 157, 158 and 161). NO WATER COULD BE GOTTEN THROUGH IT, and, after standing there and pulling at it for a short time, the fire meanwhile spreading, both of them, knowing the inflammable nature of cotton, ran to save their lives (p. 153). The other Boylan "officer," who was stationed in shed No. 1, did not even appear on the scene.

COURSE OF BUSINESS.

The general course of business between the defendant and the various steamship lines centering in New Orleans is stated in the Clayton case (173 U. S., p. 348), but for the purposes of this case

a number of additional facts were put in evidence, as bearing upon the questions of deviation raised on this appeal, a determination of which questions in favor of the appellants herein would finally determine the thirty other cases growing out of this fire which are still pending in the Second Circuit.

AS TO THE ARRANGEMENTS MADE BY THE DEFENDANT WITH THE STEAMSHIP COMPANIES, UNDER WHICH ALONE STEAMSHIPS WOULD BE SENT TO WESTWEGO TO RECEIVE COTTON.

Prior to the erection of this dock all cotton coming over the defendant's line was delivered at the city front in New Orleans, on the New Orleans side of the river, the Railway Company trucking it to the ship's side (Le Blanc, p. 48; Warriner, pp. 39 to 40, inclusive; Hammond, pp. 54 and 55; Ross, p. 62; Sanders, pp. 67 and 68; Miller, p. 31). To avoid the expense to the Railway Company of carrying this cotton eight miles further to Gouldsboro, ferrying it across the river and trucking it to the steamships, and for its sole convenience, this dock was built. It was first used for cotton in the fall of 1893, the cotton season beginning in September.

Each of the three contracts in this case is dated late in October 1894, and is for "delivery unrestricted" (pp. 176-177), which means that the railway company "was not bound to deliver the cotton at any particular date, nor was the steamer obliged to take delivery of the cotton at any particular date" (p. 109). In each case, however, such arrangement was agreed to by the steamship lines only upon the express condition that the defendant should have a certain number of bales on hand at Westwego ready to deliver before a steamer would be sent there to get it.

As to these arrangements Mr. Warriner, the agent of Elder, Dempster & Company (p. 38), the line

which was to carry the cotton in suit (p. 170), testified as follows:

> In November, 1894, "we had a number of contracts to carry cotton from New Orleans to foreign ports, where *we had agreed to take it at Westwego if a sufficient quantity was there.* The arrangement as to a sufficient quantity was that we wouldn't send a ship for less than *two thousand* bales or so, so as to keep us working at least a whole day.
>
> Q. Was any time specified or understood between you and the Texas and Pacific Railway Company, at which you should go to Westwego to receive cotton after it arrived there?
>
> A. No; the delivery on both sides was unrestricted.
>
> * * * * *
>
> Q. Then do you mean to say, Mr. Warriner, that in the season of 1893–1894, you would not send your vessel to Westwego for less than two thousand bales?
>
> A. *That was our practice then. And prior to the erection of this wharf we did not send our vessels there at all*" (pp. 40 and 41).

Mr. Le Blanc, the agent of the Harrison line (p. 47), testified as follows:

> "The minimum amount of cotton that our vessels would go to Westwego for at that time [1894] was a thousand to fifteen hundred bales.
>
> Q. Then, as I understand you, none of your steamers would go there to take any amount of cotton less than 1,000 bales?
>
> A. No; we wouldn't agree to do it in advance.
>
> Q. According to the custom in New Orleans at that time, if you had an arrangement to take, say, less than 500 bales of cotton coming from the Texas and Pacific Railway Company, where would that delivery have been made?
>
> A. Probably at our wharf.
>
> Q. That is on the New Orleans side of the river?
>
> A. Yes, sir (p. 49).

Mr. Hammond, another steamship agent (p. 54) testified as follows:

> "It was always understood we should not go there for less than one thousand bales * * *. I mean that in the season of 1893–1894 I would not send my vessels to Westwego for less than 1,000 bales unless it suited me, unless it suited my own convenience. But prior to the erection of these docks I did not send my vessels there at all. * * * It was always tacitly understood that I would not go for less than a thousand bales, and *they never demanded that I should go there* (p. 56).
>
> In 1893 and 1894, if the Texas and Pacific Railway Co. had offered me for transportation on my vessels less than a thousand bales of cotton, by the custom of the port of New Orleans such cotton would have been received by me at the city front wharves (p. 56).
>
> Q. In those bills of lading, based upon shipments under arrangements such as you describe for a through rate, it was customary, was it not, to describe the point at which the railroad would deliver the cotton as New Orleans; don't you know that? A. Always.
>
> Q. And that was supposed to be Westwego, was it not? In the case of the Texas and Pacific, between the steamship lines? A. Yes, sir, that is the way we understood it *for not less than a thousand bales.* After Westwego was built that was the understanding. * * *" (p. 59).
>
> Q. And the steamship company goes over there in order to get this cotton for export on its steamers?
>
> A. Oh, yes; they go there; that is *for a certain amount of cotton*" (p. 58).

Mr. Ross, a steamship agent of twenty-five years standing in New Orleans (p. 62), testified as follows:

> "The minimum amount for which I would go to Westwego, according to my recollection, was probably in the neighborhood of two thousand bales—something of that sort. * * * I don't think we ever had any

agreement or contract with the Texas and Pacific Railway to go to Westwego for less than two thousand bales. * * *

Q. In 1893-94 if the Texas and Pacific had offered you for transportation on a vessel of your line, less than two thousand bales of cotton, where, by the custom of the port of New Orleans, would such cotton have been received by you?

A. *Unless we had made an agreement to go to Westwego, they would have had to deliver it at our regular wharves*" (p. 64).

"The railroad company would make a contract with the steamship agent, just exactly as any shipper would do, for the carriage of a certain amount of cotton on the terms specified in that contract; that was the special arrangement I refer to. *A part of that special arrangement would be that I would go to take such freight at Westwego.*

Q. Don't you know that under those steamship contracts, when they would speak of a sea rate, we would say of 49 cents a hundred pounds, from New Orleans to Liverpool, that it was the general custom, without specifically mentioning Westwego in the contract, for the steamship to receive that cotton at Westwego?

A. Most positively no.

Q. You don't know?

A. Most positively not.

Q. *You say in your case Westwego was always named as the place of delivery, if it was the place of delivery?*

A. I say *when we went to Westwego, we did so under a special arrangement to do so and not otherwise.*

Q. *Then, if no place was named in the contract fixing the sea rate, Westwego would not be the point of delivery, according to your understanding?*

A. *Not without a special agreement; no, sir*" (pp. 65 and 66).

Mr. Sanders, the agent of the West India and Pacific Steamship Company (p. 67), testified as follows:

"Q. After the erection of this dock at Westwego, where was cotton delivered to you for

transportation by the Texas and Pacific Railroad?

A. At Westwego as a rule. * * *

Q. During the season of 1893-94 there was considerable cotton delivered to your line by the Texas and Pacific at your wharf?

A. That I can't say without referring to my books, but I presume there was, *the rule being that if they had over there at any time, say 2,000 bales, we would go to Westwego for it, and if they had a small quantity which they wished us to take, perhaps part of an accumulation, say less than two or three thousand bales, it would be delivered at our wharf* (p. 68).

Q. Before this wharf was constructed at Westwego, on that export cotton or through cotton, the place for delivery would be at a wharf on the city front in New Orleans?

A. As a rule; yes, sir.

Q. As a rule was it sometimes at the Texas and Pacific wharf in New Orleans?

A. I think on occasions it has been at the Texas and Pacific wharf on the New Orleans side.

Q. And at other times at a wharf of a particular steamship line?

A. Yes, sir.

Q. Now, after Westwego was opened, then cotton shipped in that way was shipped to Westwego and there received by the steamship lines, was it not?

A. As a rule, *with the modification that I have already mentioned, that a certain quantity or number of bales must be there at one time for delivery* (p. 70).

Q. And the point of delivery from the railway company to the steamship line under that class of bills of lading was always understood to be Westwego, was it not?

A. Yes sir; *under the modification I have expressed*" (p. 71).

Mr. Fornaris, the agent of the French line (p. 31), would not send to Westwego for less than 1,000 or 1,500 bales (p. 32).

See also the testimony of Alexander Harris, the agent of the Cromwell Line, to the effect that all cotton to be delivered to his line was carried to New Orleans and there delivered (pp. 33 *et seq.*).

THE EVIDENCE OF THE NEW ORLEANS MERCHANTS AS TO THE LIMITS OF THE PORT.

John G. Woods, a commission merchant at New Orleans for ten or eleven years, testified as follows:

> "Q. As a merchant, connected with the importing business here, would you say that in 1894 Westwego was considered, commercially speaking, within the port of New Orleans?
> A. No; I would not" (p. 35).

L. C. Fallon, a coffee and commission merchant in New Orleans for thirty-eight years, testified as follows:

> "Q. In November, 1894, did you consider Westwego as being commercially within the port of New Orleans?
> A. Well, really, I don't know whether Westwego is a part of the port of New Orleans to day. I never would accept delivery of a cargo of coffee there. If a shipper of coffee was to send me a cargo of coffee for delivery at New Orleans, and it was delivered at Westwego. I wouldn't consider it brought to the port of New Orleans. *I never knew of the delivery of any goods consigned to the port of New Orleans at Westwego*" (pp. 37 and 38).

George R. Westfeldt, a coffee merchant in New Orleans, testified as follows:

> "Q. In 1894 did you consider Westwego as commercially within the port of New Orleans?
> A. Not for coffee purposes" (p. 38).

From the correspondence between the Treasurer and General Manager of the defendant it clearly ap-

pears that the defendant was engaged at this time in delivering all cotton other than export cotton, at the City of New Orleans (see letters and telegrams, pp. 194 to 200), export cotton only being "detained" at Westwego.

Assignments of Error.

The following are the assignments of error relied upon by the plaintiffs in this Court (pp. 211-213):

First.—That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered against the plaintiffs in error and in favor of the defendant in error, upon the trial of this cause.

Twelfth.—That the said Circuit Court of Appeals erred in holding that the said Circuit Court committed no error upon the trial of said cause in refusing, at the conclusion of the testimony, to allow the plaintiffs in error to go to the jury on the question whether Westwego was, within the terms of the bill of lading, such a place within the port of New Orleans as the cotton could be taken to and unloaded by the defendant in error or was so well known by commercial custom of such long standing or so general or so universal as to be fairly within the constructive knowledge of the shippers.

Thirteenth.—That the said Circuit Court of Appeals erred in holding that the said Circuit Court committed no error upon the trial of said cause in refusing, at the conclusion of the testimony, to allow the plaintiffs in error to go to the jury upon the question of the negligence of the defendant in error.

Fourteenth.—That the said Circuit Court of Appeals erred in holding that the said Circuit Court committed no error upon the trial of this cause in directing, at the conclusion of the testimony, a verdict in favor of the defendant in error.

First Point.

The Circuit Court of Appeals erred in affirming the action of the Circuit Court in refusing to allow the plaintiffs to go to the jury on the question of negligence and in directing a verdict for the defendant.

After the plaintiffs had rested their case the defendant made a motion for the direction of a verdict *in its favor. This was denied* with leave to renew at the close of the whole case. The defendant then announced that it would offer no evidence and rested, and renewed its motion, and thereupon the trial court directed a verdict for the defendant and the plaintiffs excepted (p. 162).

WERE THE PLAINTIFFS ENTITLED TO GO TO THE JURY ON THE QUESTION OF NEGLIGENCE?

(*A.*) It is now familiar law that

> "In every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. * * *
> "If the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury."
> *Pleasants* vs. *Fant*, *89 U. S.*, *116*.

Also,

> "That although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict so that one based thereon would be set aside, the Court is not bound to submit a case to the jury, but may direct them what verdict to render."
> *Herbert* vs. *Butler*, *97 U. S.*, *319* (*1877*).

(*B.*) But it is not in every case where a verdict *might* be set aside, that the Court will direct a verdict.

A very recent statement of what we concieve to be the law on this subject, has recently been given in the case of *Macdonald* vs. *Metropolitan Street Railway Company*, *167 N. Y., 66-69*, in which case it is said:

> "The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and delusive. There is no standard by which to determine when a verdict may be set aside. It depends upon the discretion of the Court. The result of setting aside a verdict, and the result of directing one are widely different and should not be controlled by the same conditions or circumstances. In one case there is a retrial. In the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or procedure. The other determines substantive and substantial rights. Such a rule would have no just principle upon which to rest.
>
> While in many cases, even where the evidence is sufficient to sustain it, a verdict may be properly set aside and a new trial ordered, yet, that in every such case the trial Court may, whenever it sees fit, direct a verdict, and thus forever conclude the parties, has no basis in the law, which confides to juries and not to Courts the determination of the facts in this class of cases.
>
> We think it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the Court may properly direct a verdict. So long as a question of fact exists, it is for the jury and not for the Court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that as a matter of law no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the Court to determine it. But whenever a plain-

> tiff has established facts or circumstances which would justify a finding in his favor, the right to have the issue of fact determined by a jury continues, and the case must ultimately be submitted to it.
>
> The credibility of witnesses, the effect and weight of conflicting and contradictory testimony, are all questions of fact and not questions of law.
>
> If a court of review having power to examine the facts is dissatisfied with a verdict, because against the weight or preponderance of evidence, it may be set aside; but a new trial must be granted before another jury so that the issue of fact may be ultimately determined by the tribunal to which those questions are confided. If there is no evidence to sustain an opposite verdict, a trial court is justified in directing one, not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and hence, as a matter of law, the party was not entitled to recover."

(*C.*) We are fully aware that we come to this Court appealing from the deliberate judgments of Judges distinguished for their learning and ability, and that this Court has recently said:

> "The Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who, in our jurisprudence, stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for knowing all those matters in a trial not capable of record, and when, in his deliberate opinion, there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an Appellate Court will pay large respect to his judgment, and if such judgment is approved by the proper Appellate Court, this Court, when called upon to review the proceedings of both Courts, will rightfully be

much influenced by their concurrent opinions."

Pythias Knights Supreme Lodge v. *Beck*, *181 U. S., 49 (1901).*

(*D.*) Notwithstanding these facts and the law last stated, we feel confident that we can conclusively show that both the trial Court and the Court of Appeals very clearly erred in their conclusions.

Were it necessary, we believe we could establish the proposition that there is no other legal conclusion to be properly drawn from the testimony herein, than that the direction of a verdict should have been in favor of the *plaintiffs* and not of the *defendant.*

(1.) The defendant gave no evidence.

In such a case, this Court has said in *Pleasants* vs. *Fant* (*supra*), (citing the case of *Paulding* vs. *U. S., 7 Cranch, 219*, a decision of Chief Justice Marshall),

> "A party so placed admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit, but the testimony is to be taken most strictly against him, and such conclusions as a jury might justifiably draw the Court ought to draw."

(2.) Not only is the constitutional right of trial by jury zealously guarded by this Court, but it cannot be doubted that--

> "Where a cause fairly depends upon the effect or weight of testimony it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. *It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the Court, in the exercise of a sound judicial discretion, to set aside a verdict in opposition thereto.*"
>
> *Phœnix Ins. Co.* v. *Doster*, 106 *U. S.*, 30, *at p.* 32.

The proposition is stated in *Texas Pacific Railway Co.* vs. *Cox*, *145 U. S., 593 (1892)*, (Mr. Chief Justice Fuller delivering the opinion of the Court), as follows:

> "The case should not have been withdrawn from the jury unless the conclusion followed as a matter of law that no recovery could be had upon any view which could be properly taken of the facts which the evidence tended to establish."

(3.) Questions of negligence are peculiarly questions of fact for determination by a jury

This Court has said, in *Grand Trunk Railway* vs. *Ives*, *144 U. S., 408:*

> "*There is no fixed standard in the law by which a Court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent and what shall constitute ordinary care, under any and all circumstances.* The terms 'ordinary care,' 'reasonable prudence' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. WHAT MAY BE DEEMED ORDINARY CARE IN ONE CASE, MAY, UNDER DIFFERENT SURROUNDINGS AND CIRCUMSTANCES, BE GROSS NEGLIGENCE *The policy of the law has relegated the determination of such questions to the jury under proper instructions from the Court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the Court.*"
>
> *Grand Trunk Railway* vs. *Ives*, 144 *U. S.*, 408, *at p.* 417.

In *Richmond & Danville Railroad Company* vs. *Powers, 149 U. S., 43* (Mr. Justice Brewer delivering the opinion of the Court), it is said:

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury, and this is so whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed fair-minded men will honestly draw different conclusions from them."

In *Gardner* vs. *Michigan Central Railroad Co., 150 U. S., 349 (1893)*, this Court again said (speaking through Mr. Chief Justice Fuller):

> "The question of negligence is one of law for the Court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

The determination of a question of negligence is for the jury when a given state of facts is such that reasonable men may fairly differ upon the question.

Baltimore & Ohio R. R. vs. *Griffith, 159 U. S., 603.*

Warner vs. *Baltimore & Ohio R. R. Co., 168 U. S., 339.*

Patton vs. *Texas & Pacific Railway Company, 179 U. S., 658, 660 (1901).*

(4.) Where the premises are in the exclusive possession and control of the defendant and the facts are peculiarly within its knowledge, very slight evidence of negligence is sufficient to make out a prima facie case.

Indeed, the court at Circuit clearly recognized this rule theoretically, for it said,

> "The burden of proof is upon the plaintiff. But, of course, it is to be taken into consideration that his testimony has to be sought from employees and from persons connected in one way or other with the defendant, in part at least, and that while the burden remains upon him, slight testimony may be sufficient—should properly be sufficient—to send the case to the jury for the drawing of proper inferences from the facts proved" (p. 162).

The New York Court of Appeals has said, all concurring, with reference to the loss of a quantity of cutlery, an article not at all inflammable, but destroyed by fire upon a defendant's wharf, in a case where the origin of the fire was not disclosed,

> "We think that enough was shown to call upon the defendant to explain the circumstances attending the destruction of the property; and that, in the absence of any such explanation, the jury would have been authorized to infer that proper precautions for its safety had not been taken. Whether due caution required that the wharf should be furnished with the means of extinguishing fire, or that a watchman should be kept there during the night, were questions for the jury, dependent upon the circumstances of danger which may have surrounded the premises. The plaintiff's evidence of the absence of the means of extinguishing fire was not of the most satisfactory character; but the defendant, although possessing the best means of proof upon the subject, did not controvert it; while the fact of the fire originating on the defendant's premises, in connection with the failure of the defendant to offer any explanation of its origin, or even to produce any of the persons said to have been left in charge, or to show that they performed their duty, or that any effort was made to take the goods out of the reach of the fire, were circumstances from which the jury might have drawn inferences unfavorable to the defend-

ant on the question of negligence. The nature of an accident may itself afford *prima facie* proof of negligence (Curtis *v.* Roch. and Syra. R. R. Co., 18 N. Y., 534, 544; Story on Bailments, Sec. 338; 5 Exch., 787; 3 Hurlst. & Colt., 596; 13 Peters, 181; 5 Ad. & El. 747; 11 Pick., 106; 2 Camp., 79) and we think, as the case stood, the judge erred in not submitting the question of negligence to the jury. These views do not conflict with the case of Lamb *v.* The Camden and Amboy R. R Co (46 N. Y., 271), cited on the part of the respondent; although the burden of proof of negligence in such cases unquestionably rests upon the plaintiff, yet he is not always required to point out the precise act or omission in which the negligence consists. Negligence may be inferred from the circumstances of the case. Where the accident is one which in the ordinary course of events would not have happened but for want of proper care on the part of the defendant, it is incumbent upon him to show that he had taken such precautions as prudence would dictate, and his failure to furnish the proof, where, if it existed, it would be within his power, may subject him to the inference that such precautions were omitted."

Russel Mfg. Co. v. *N. H. Steamboat Co., 50 N. Y., 126, 127.*

(5.) The isolated position of Westwego, its absolute lack of external facilities for extinguishing fire, its lack of police protection, have been already commented upon.

By reason of the peculiar contracts above stated, concerning delivery at Westwego, and under which the Steamship Companies would not go there for less than 2,000 bales, an immense accumulation of cotton occurred. The Steamship Companies were under no obligation to take delivery at any special or reasonable time, and the delay in the arrival of vessels at New Orleans placed the Steamship Companies under no legal liability to the defendant.

(6.) The defendant's officials were very much disturbed in relation to this accumulation of cotton at Westwego. Satterlee, the secretary and treasurer of the company, writes to Thorne, the third vice-president and general manager, under date of October 15, 1894, two weeks before this cotton was *shipped in Texas:*

> "Noting the very heavy movement of cotton during the last week or since October 1st, please let me know the condition at New Orleans, and if it is forcing much accumulation at that point, particularly on our export cotton wharf. I feel very anxious on the subject, *fearing an accumulation that may expose us to great risk*" (pp. 195, 196).

On October 20th Thorne writes to Satterlee:

> "I am very much surprised on my return to the office, after a few days' trip over the Eastern Division, to find, on checking the reports, that the cotton on hand at New Orleans has doubled up on us in the last five or six days. We have on hand, at the last report, at New Orleans and Westwego, 48,000 bales of cotton, and I have taken the matter up vigorously and am in hopes that we can force the delivery" (p. 197).

On November 6th he telegraphs:

> "The labor trouble and delay in loading vessels at New Orleans the past few days has increased. The amount of cotton on hand undelivered our report this morning shows about 26,000 bales of cotton at Westwego, and the same amount at New Orleans, with but poor prospects for deliveries to-day or to-morrow or until afterthe election" (p. 197).

(7.) The situation grew worse after November 6th, for on November 12th, the date of the fire, there were on the dock and in cars at Westwego over 28,000 bales of cotton.

(8.) Notwithstanding this accumulation of cotton, the defendant received this cotton at Greenville, Texas, intending to take it to Westwego. The bill of lading is dated October 29th (p. 174).

It may well be asked whether it was not negligence for the carrier to thus carry this cotton to Westwego, in view of the accumulations there of such an unprecedented amount of cotton, worth over a million dollars. The cotton involved in this suit was, as we have said, not even unloaded from the cars by the 12th of November, though it arrived on the 7th. It is not possible, we submit, to hold, as matter of law, that taking these cotton laden cars to this dock, already overcrowded with cotton and cars loaded with cotton, was not negligence.

In *Thomas* vs *Wabash, St. Louis and Pacific Railroad Co., 63 Fed. Rep., 302*, it is said:

> "It is sufficient to say * * * that the carrier was bound to know when he accepted the cotton that he had or could avail himself of facilities to transport it within a fairly reasonable period. It is unnecessary to cite authorities in support of the position that a carrier is not bound to receive freight where he has no facilities for transporting it, or when his line is already overtaxed and congested by freight previously accepted for transportation. The C. & C. L. R. Co. was under no obligation to receive freight at Memphis when it had no ability to transport it to the destined point within a reasonable time. It chose to do so, however, and cannot be relieved from its undertaking because of difficulties in the way of the performance of the contract when its agent knew of such difficulties at the time the contract was executed."
>
> "It is not mere delay therefore but negligent delay in a dangerous place—willful it may be said—and deliberate exposure of the cotton to danger from fire that fixes the liability of the carrier. The danger could have been foreseen and guarded against."

In *Thomas* vs. *Lancaster 71 Fed. Rep. 485* (Circuit Court of Appeals for the Seventh Circuit, Jenkins, *J.*, writing the opinion), it is said:

> "The COTTON, as is well known, IS A HIGHLY INFLAMMABLE MATERIAL. * * * THE RAILROAD COMPANY WAS BOUND TO DEAL WITH THIS PROPERTY WITH A CARE PROPORTIONATE TO THE RISK. Being inflammable the cargo should be zealously guarded against exposure to fire."
>
> "The exemptions from loss by fire contemplate a continuous carriage according to the usual course of business, and the danger incident to such carriage. * * * It certainly did not contemplate that the carrier, during such suspended transportation, might negligently expose the cotton to dangers that ordinary forecast should have guarded against. In case of delay by the carrier he is bound to protect the property in his charge from unreasonable hazards. He is bound to guard it from dangers which ought reasonably to be apprehended. If he fail therein, and especially if he unnecessarily exposes the property to apprehended danger, he is liable notwithstanding the exemption of the bill of lading, and although his act may not be the immedate cause, but the concurring cause of the loss."

(9.) New Orleans was at this time in the midst of very serious labor riots. The terminals of two railroads, with a large amount of cotton in each, had very recently been destroyed by fire. Was it or was it not negligence, or was it or was it not an additional fact which the jury might have properly considered in determining a question of negligence, that with this vast accumulation of cotton on an isolated and unprotected dock, in a time of great apprehension on account of labor troubles which had already caused the destruction of the terminals of two railroads, this defendant, instead of increasing its force of watchmen as the cotton increased in amount, *decreased* its force of watchmen as the cotton *increased* in amount?

(10.) This defendant cannot pretend that it did not have notice of the increased danger of fire. As late as October 23, 1894, a fire had occurred upon this dock, the report as to which is as follows:

> "Officer Campbell, who is on duty at Westwego for account of the T & P. R. R. in No. 1 shed, reports that at 4.15 P. M. two bales of cotton in shed No. 1 were discovered to be on fire by Thomas Roach and John Casey, two longshoremen who were working there loading the British steamship *British Crown*. Officer Campbell * * * and Mr. Wilkinson, superintendent of the T. & P. R. R., and some longshoremen extinguished the fire. About twelve bales had to be removed from off that burning bale before they could throw water on them. * * * No person had been working near the cotton that caught fire for about a week. It had evidently been burning about half an hour before it was discovered, but no smell of fire was detected. They were at the bottom of the tier of 100 bales and got on fire near the buckle. * * * Mr. Wilkinson * * * is disliked by the colored laborers employed there on account of the way in which he swears at them whenever he tells them to do anything. On Sunday, October 31, 1894, while he was waiting for a car at the corner of one of the T. & P. piers, he asked a negro why he did not go to work that day, and he said he would not go with that man, Mr. Wilkinson, as he had no use for a negro and wanted him to work twelve hours for ten. The officer thinks that some person having a grudge against Mr. Wilkinson must have tried to set the cotton on fire" (pp. 150, 151).

Not only, then, were there these labor troubles in New Orleans to require additional precautions, but as affecting particularly the Texas and Pacific Railway Company, there was notice to it that the negro laborers were so inimical to its Superintendent Wilkinson that the fire of October 23d was concluded to be the result of incendiarism.

(11.) Wilkinson, the chief clerk on the dock, had also charge of the fire apparatus (p. 21), and was a very careless and unfit man, but still retained in the employment of the defendant. He was reckless enough to shoot among the cotton at a dog, on which subject a report was made. That occurrence took place on the 9th of November.

> "Officer Peake, who was on night duty at Westwego, states that last Friday night Mr. Wilkinson, the chief clerk, fired at a dog. This occurred just outside the office, and in the line of his fire were two rows of cotton" (p. 151).

Wilkinson was often drunk during business hours, as testified by Coffey (p. 75), Lecorgne (p. 80) and Trainor (p. 84).

(12.) In this vast mass of cotton the defendant continued its course of pulling in and hauling out cars on the railroad track between the shed and the river, and on the railroad tracks on the woods-side of the sheds.

This was being done on the day of the fire, as shown above, and on this day the locomotive was actually within a few feet of the place where the fire broke out, and the cotton was so close to the west rail of this track near the river that a man could not safely stand between the track and the cotton (pp. 100, 101).

It is submitted, therefore, that here there was a situation calling for the utmost watchfulness and for increased precautions commensurate with the greatly increased danger. A vast and unprecedented accumulation of cotton which was worth over a million dollars; this cotton not headed as was custom[illegible] on other docks, but piled, and piled nearly to the roof of the sheds; the whole space so full that no more cotton could be unloaded; the bales jammed together; no gangways running lengthwise of the sheds; the few cross gangways running from the river to the woods very narrow, and impeded with cotton headed up

and cotton piled on that, so that there was hardly room for a truck to pass through with a bale of cotton lengthwise of the truck; the whole city excited by labor riots; a drunken superintendent who was quarrelling with the negroes and shooting at dogs amid the cotton; a locomotive engaged in going up and down in very close proximity to the cotton; an extremely dry season, no rain having fallen for weeks; an east wind blowing so that any sparks from the locomotives which traveled up and down the track between the river and the sheds would be blown directly into the sheds; the cotton piled so close to the west rail of the track that there was no room for a man to stand between the cotton and such track when the locomotive went by,—can we not justly say that these facts alone, a fire having occurred and destroyed the cotton, are such that they should have been presented to the jury to draw such inferences as they saw fit either for or against the defendant, without any proof whatever on the subject of the character or condition of the fire apparatus?

But when to this situation there is added the fact that this large area, containing this enormous value, was in the charge of only *three* men, no one of whom is shown to have had any experience whatever in handling fire apparatus or extinguishing fires, being mere *watchmen* and not skilled *firemen*, the one in authority being nineteen or twenty years of age, may we not say that it was quite within the realm of possibility that some reasonable man should believe, and by his verdict say, that no prudent owner would so leave his own goods? Clearly it was not the province of any *Court* to draw, as the courts below have done, the inference of *fact* that three watchmen constituted a sufficient number of firemen to guard against and extinguish fires in this mass of inflammable material.

And when to all these facts the still further facts are added, that on the breaking out of a fire, which by the uncontradicted testimony could have been extin-

guished if the fire apparatus had worked to its capacity, only two of these "*watchmen*" appeared on the scene; that these two could not make the apparatus work, and that it did not work at all, we say, without fear of contradiction, that the books can be searched in vain for any case bearing any legal resemblance to this, where the question of negligence was taken away from the determination of a jury.

(*E.*) Let us now examine the opinion of the Circuit Judge (pp. 162 to 165).

We respectfully submit that that Court not only drew a large number of inferences of fact all of which properly belong to the province of the jury only, but that some of the most important of those inferences are not in any respect warranted by the testimony.

1. The learned Judge at Circuit says:

> "For instance, it may very well be argued that the circumstance of a locomotive being allowed to run upon the track among this cotton by the end of the wharf might perhaps be sufficient to send the case to the jury, under ordinary circumstances, to determine whether that was negligence, in view of the peculiarities of cotton and its liability to become ignited, if there were anything to show that this fire was at all connected with the movement of that engine. *But it appears that the engine was at one end of the dock and this fire was in the middle of the shed.*"

In this statement the Circuit Court was clearly in error.

On the day of the fire in question the steamship *Malabar* was lying opposite Shed No. 1, loading with cottonseed meal and cottonseed cake, and on the same day the steamship *Elberfeld* was lying opposite Shed No. 2, loading with the same kind of goods; these goods were not taken from under the sheds,

but from cars on the track east of the sheds, and as the cars were emptied full cars were brought in (see testimony of Ellis, Nie, Stytch, John Reinhardt, William Reinhardt, Lincoln and Kent, who all worked at loading the *Malabar*).

Eilis says:

> "The locomotive was on the track beside the *Malabar* about 12 o'clock" (86-87); he had seen a locomotive there a number of times before. "The engine came in about half an hour before that; she came in, got the cars, and pushed them up and then went off again" (pp. 86 and 87).

Nie says that he saw a locomotive on the track at about 12 o'clock; how far up she went he did not know, but she passed the hatch where he was working; he saw the engine on the wharf before; saw it there other times; they came to pull cars in and they often came in there (89).

After the engine came up he went off to dinner and left her there. "JUST PREVIOUS TO DINNER TIME SHE CAME UP ON THE WHARF, STOPPED AT HATCH NUMBER 3, AND WENT UP THE WHARF FURTHER; * * * WHEN I WENT TO DINNER SHE WAS PUFFING SOMEWHERE UP ON THE WHARF; *she was moving up there*" (92).

The wind was from the east and north east during the day (p. 120).

If the learned Court had recollected this testimony, can it be that in view of its own remarks above quoted, it could have failed to send the case to the jury?

In addition to this, the Court wholly ignored the evidence, that after half past five in the evening and shortly before this fire, it was the general practice to haul out the empty cars on this track and bring in the loaded cars (p. 74).

In regard to fires from locomotives, Wharton says:

> "A slight inference of negligence however, raised by the plaintiff's case, is sufficient

> to throw the burden of disproving negligence on the defendant. It is a mistake, as has been elsewhere shown, to suppose that negligence can be only proved by positive affirmatory evidence. In cases of this class, from the nature of things, it is not necessary for the plaintiff to do more than to show such circumstances as lead to the inference of negligence. There may be no direct proof of negligence, yet the way in which an injury is done may be such that negligence is the most probable hypothesis by which it can be explained, and when this is so the defendant must disprove negligence by showing that he exercise due care.
>
> *Wharton on Negligence, Sec. 371.*

This rule is particularly clear where the defendant brings its locomotives into close proximity with inflammable material. Indeed, it is negligence to do so.

Hoffman v. *King, 160 N. Y., 618.*

See also

Sect. 678, Shear & Bedf. on Negligence,
and
Eddy v. *Lafayette, 49 Fed. Rep., 807.*

(2.) Again, the learned Court suggests that the plaintiffs have not established that the fire was the result of arson. They have made no such claim.

The fact that only a few days before this cotton was destroyed, a fire of incendiary origin was discovered and extinguished, might, we ventured to presume, cast upon the defendant the duty of increasing its force of watchmen rather than decreasing it; but we contended that at least, the plaintiffs were entitled to go to the jury on the additional proposition whether, under the circumstances of this case, reasonable care had been taken of this property in *de*creasing the force of watchmen as the danger *in*creased.

We might well claim that the undisputed facts of a locomotive moving and puffing in near proximity to this cotton, with the wind blowing from this track toward the cotton, and of the failure of the

fire apparatus to work in the hands of those chosen by the defendant to manage it, were sufficient to raise the presumption of negligence, and, the defendant offering no testimony, that the plaintiffs were entitled to the direction of a verdict.

The proper tribunal, however, before which to establish the fact of negligence is, of course, a jury, and to secure a reversal of this judgment the plaintiffs need only show that the facts were such that reasonable men might have drawn different inferences therefrom, and that if the jury had found that the facts indicated negligence, their verdict would not be set aside as against the evidence.

We beg, however, to submit that we know of no such harsh rule of law as would compel a plaintiff to show conclusively what was the origin of the fire on defendant's premises.

Even conceding, for the purposes of the argument, that if the defendant had called its employees as witnesses, such persons could not have shown what the origin of the fire was, this would not have necessarily relieved the defendant. No one might be able to say that he saw a spark carried to the cotton from the locomotive, either while it was, on the day of the fire, puffing somewhere up on the wharf, while it pulled in or hauled out the empty or full cars during the day or at the close of the day's work; no one might be able to say that he saw some negro, whom the drunken superintendent, Wilkinson, was accustomed to curse, set fire to the cotton, or that he saw one of the three distinguished "officers" whom Boylan picked up around New Orleans to watch the cotton, or one of the workmen leaving for the night, carelessly light his pipe among the cotton. How does this relieve the defendant?

The gist of this case is not only a possible negligence in the origin of the fire, but the clearly established negligence of having such an immense accumulation of cotton with such an absurdly inadequate force to help extinguish fire, and such a fire ap-

paratus, that when the fire broke out it would not work.

The destruction of the cotton is what is complained of, not alone the origin of the fire.

(3.) The Circuit Judge says that

> "The evidence here shows that the fire was most promptly discovered,"

and he apparently bases this conclusion upon the fact that

> "undoubtedly at the time Valle gave his alarm of fire there was very much less than the quantity of fire that there was there when Robeau got there."

But how does this show that the fire was most promptly discovered? Valle is not called to show what the condition of the fire was when he first saw it. As it was in the middle of the shed where Valle had no busmess to be, it is probable that it was discovered by him by the light of the fire. But no testimony was given from which the jury could say how long this fire had been smouldering or smoking.

We submit that the jury would have been fully warranted in finding that this fire started long before it was discovered. It would appear to be probable that before discovery this fire had gained greater headway than the fire of October 24th, and the official report of the defendant admits that that fire was not only not discovered by its own watchmen, but had been burning *for about half an hour* before discovery by two of the many longshoremen working there at the time, although it occured in broad daylight (p. 150).

(4.) Again, the conclusion of the trial Judge, not mentioned in the opinion of the Court of Appeals, is that because this fire was *discovered* promptly there was not sufficient evidence to submit to the jury the question of whether the number of watchmen was

properly proportioned to the amount of territory and merchandise they had to watch.

At the time of the breaking out of this fire Robeau was standing on the river side of the dock about 30 feet under the shed at the lower end, towards No. 1 shed. Upon hearing the cry of fire he ran through a gangway to the woods side of the shed, a distance of over 200 feet, to see if he could see anybody, but not seeing any one he ran back again to the river side, 250 feet more. He then ran to the upper end of his beat (p. 157), a distance of 300 feet, and then through to the woods again (p. 158), another 250 feet. He then saw Valle on a pile of cotton at about the centre of the shed and 70 or 75 feet down from the upper end of the shed (pp. 158 and 154). Robeau then went to help him, passing down 70 or 75 feet and in toward the centre of the shed, over 100 feet, making, at the lowest estimate, a total of over eleven hundred feet, *nearly a quarter of a mile, that Robeau actually ran* in his efforts to find the fire and before he reached the point at which it had broken out, and yet when Robeau got there, after running all around the dock to find the fire, and had climbed upon top of the cotton, after going to the valve, the fire could easily have been extinguished if only the means provided by the defendant for use in such an emergency, had worked.

When Robeau got near to Valle, Valle shouted to him to go down and turn on the valve and Robeau went. As he says: "I could only go sideways; I couldn't hardly stand, and I found the valve open. I then came back and tried to help Valle with the hose" (p. 153). They couldn't do anything with the hose and Valle told Robeau to "go down and untangle the hose," but Robeau wouldn't go because of the fire, and soon afterwards, just how long no one can estimate with any degree of accuracy, they had to run (p. 153).

That was the situation, as proven in so many words by the testimony. Surely, then, it would not have been an unreasonable inference for the jury to

draw, that if Robeau or some other watchman had reached the scene quicker he would have had time and opportunity to untangle the hose.

This defendant must be held chargeable with the knowledge that if fire once broke out in this vast mass of nearly 28,000 bales, only prompt action by an efficient force could save the whole accumulation from destruction, yet this statement of the learned Court deals solely with the question of the prompt *discovery* of the fire.

We had hitherto supposed that a much more important question was its prompt *extinguishment*. The Court fails absolutely to take into consideration the main contention of the plaintiffs, namely, that the number of watchmen employed was insufficient in case a fire was discovered, to *put it out*. Clearly the plaintiffs had the right to insist that the *jury* should have the opportunity to draw the conclusion that if more watchmen had been employed on this dock, some of them would have discovered the fire even sooner, and would have been near enough to have responded more quickly to an alarm of fire, and by reason of their proximity to the fire, would have had time enough to reach the fire when it was still less than it was when Robeau got there, and thus have had time to smother it, or to prevent the hose from becoming tangled, or to untangle the hose, and been enabled, if water had come, to put out the fire, for, as Robeau says, even after he got there, IF THEY COULD HAVE GOTTEN WATER THROUGH THE HOSE THEY COULD HAVE EASILY PUT OUT THE FIRE (p. 155).

And if a jury had found that this defendant was negligent in not having more men, not only to discover this fire, but to *put it out*, the evidence would have been sufficient to support such verdict.

(5.) Again, the learned Judge says:

> "There is no suggestion here in the testimony that the piling up of the cotton interfered in any way with the access to the hydrant to turn the water on."

But, the Court evidently altogether forgot the evidence that sometimes cotton would fall over and block the hose (p. 85), and ignored the important and undisputed testimony that there were no alleyways at all running parallel with these long sheds, and that the cotton was piled so high as to shut out all reasonable opportunity to see any fire until it had gained headway, and that the piles of cotton offered the gravest obstruction to the free use of the hose after the discovery of the fire. A man unincumbered could only wedge himself in sideways through a narrow gangway to a hydrant, but it was a very much more difficult matter after encumbering himself with hose 100 feet long, to attempt to stretch it over piles of cotton reaching well-nigh to the roof.

(6.) The Circuit Court concludes:

> "There remains only the *additional circumstance*, which is in testimony from Robeau, that the valve having been turned on, the water did not come out of the nozzle of the hose; and the explanation which he himself gives is that the hose was kinked and tangled so the water would not flow through from the valve to the nozzle.
>
> There is nothing upon which we can infer that there was anything the matter with the tank or the supply of water, or the valve or the hose itself, or even with the place where the hose was put; and there is nothing in the testimony here to show that to stack up the hose the way it was stacked, folding it back and forth on the platform, was negligence on the part of the persons so stowing the hose. There is no evidence to show that it was. For aught that appears here that was a perfectly proper mode of stowing it. *As far as we can infer* what may have produced the failure of the water to go through the hose, it is apparent that the hose was thrown down, either intentionally by Valle to get at it better or accidentally in scrambling up to his position on the cotton—was thrown down in a pile on the platform, whereupon, instead of kicking

> the kinks or pulling the kinks out of the coils of hose that he had there so as to give an opportunity for an unobstructed flow of water, he turned the water on first and then undertook to pull the kinks out afterwards, expecting the water to force its way through. I do not think that single circumstance, *assuming that that was the way it came about*, is sufficient to hold the company to the responsibility of negligence" (fol. 240).

It is submitted that nearly every sentence in this portion of this opinion is wholly unwarranted, and entirely unsupported by the evidence.

(*a.*) Robeau does not use the word "*kink*," a word which the skillful counsel for the defendant sought to put in his mouth, endeavoring to convey the impression that the pressure of water was so great that the hose was kinked thereby. The testimony on this point is as follows:

"CROSS-EXAMINATION:

> Q. What did you do when you went there? [*i. e.* down on the floor of the dock to open the hydrant valve.]
>
> A. I went there and I saw the valve was wide open.
>
> Q. The what?
>
> Q. The valve of the pipe.
>
> Q. And was there water in the hose?
>
> A. Kind of water; yes, in the hose.
>
> Q. It had pushed out in the hose, had it?
>
> A. Yes, swelled up.
>
> Q. *How far had it pushed out and swelled up in the hose?*
>
> A. *I didn't look. As soon as I saw it open I went to Valle to help him.*
>
> Q. What did you do to help him?
>
> A. We tried to pull the hose free and we couldn't do anything.
>
> Q. The pressure of water had KINKED the hose?
>
> A. Yes, the hose was so TANGLED that we couldn't do anything (p. 158).

REDIRECT:

Q. Mr. Taggart has asked you if the pressure of water in the hose made it so heavy you could not pull it out?

A. I couldn't pull it, and I know I am a strong man.

Q. Listen to my question. When you were pulling on the hose with Valle, *why didn't it come up? What was the matter with it?*

A. *It was so badly tangled.*

Q. Was there any water in it down on the platforra?

A. Yes; down on the platform. You mean the plank?

Q. At the plank?

A. Yes.

Q. But when you got up and were pulling with Valle, *was the hose* that was below you —5 or 6 feet below, *where it was tangled up*— was it *full of water?*

A. *I didn't look at that*" (Robeau, pp. 161 and 162.

(*b.*) Robeau nowhere says that the hose was so kinked that the water would not flow through it. He says the hose on the platform where it was kept was tangled so that Valle and he could not pull it free. As to what tangled it, who tangled it, how or when it was tangled, where it was tangled, or whether it was tangled when Valle got there, there is no word of proof. As far as the evidence shows it was not tangled by any pressure of water.

On the contrary, Robeau said he did not notice how far the water swelled out the hose at the valve, and did not look to see whether the hose on the platform was full of water (pp. 161, 162).

As we have shown, there is not one syllable of evidence in this case that this hose had become heavy and cumbrous because of any water in it. It was heavy in itself for one man to carry over piles of cotton. If tangled, it may have been because blocked by the bales of cotton that had fallen upon it or from careless coiling.

We are absolutely in the dark as to what tangled

the hose. There is not a shred of testimony to show that either the pressure of water or that Valle tangled it. We do not even know what Valle did in relation to the hose, except that he got the nozzle a few feet above the rest of the hose on the platform.

Very evidently he did not *believe*, when he was tugging at the tangled hose, that such tangle was a "*kink*," or that the hose was heavy with water; he doubtless believed that there was no water in the hose, for he called to Robeau to go down and open the valve.

Valle apparently had not opened the valve. There is no evidence that he had, and unless we come to the conclusion that he had wholly lost his head, we must find that he had not opened the valve, as he shouted to Robeau to go and open it. Robeau went down to the valve and there found it open, but also then found the water, the only water we have in the whole testimony, leaking.

> "Q. You did not see any water when you were opening the valve?
> "A. Yes, I saw the pouring.
> "Q. Leaking, you mean?
> "A. Yes."

This means, the jury might well say, that the hose was not screwed on to the pipe tight enough, or that the hose was ripped, and thus the water allowed to leak—pour out.

Again, the place where Robeau and Valle stood was only a very few feet above the hose on the platform, and the length of hose which was free could not have been at the utmost more than ten feet. It surely cannot be claimed that the pressure of water was so great that it filled the hose for ninety feet, and there "*kinked*" it. This attempt to show that there was a pressure of water in the hose which "*kinked*" it, is wholly unsupported by the evidence.

(*c*.) The hose was tangled, as the witness says. It was not kept in the ordinary way, stretched out

or rolled on reels, and cotton sometimes fell over and blocked it. It was for the jury to say whether keeping the hose folded in this unusual way and so surrounded with cotton that it could become tangled and unfit for use in the moment of peril was, negligence.

(*d.*) Not a single syllable of testimony supports the extraordinary inference of the Court, that "it is apparent that the hose was thrown down, either intentionally by Valle to get at it better, or accidentally in scrambling up to his position on the cotton." Were this true, what an astounding proposition it would be to say that a jury could not find that if the hose was kept in such a condition as to be tangled and rendered useless by such a method of handling, it was not negligence.

(*e.*) But the Court further says that after the hose was thrown down in a pile on the platform, Valle

> "instead of kicking the kinks or pulling the kinks out of the coils of hose that he had there, so as to give an opportunity for an unobstructed flow of water, he turned the water on first and then undertook to pull the kinks out afterwards, expecting the water to force its way through."

The picture that the Court draws is wholly unsupported by the evidence. As we have shown, there is no syllable of evidence which would justify a Court or jury in finding that there were any kinks in this hose at all.

Valle is made by the Court, not by the testimony, to throw the hose down in a pile on the platform, either intentionally or accidentally in scrambling up to his position on the cotton, and it is said by *the Court* that he should then have kicked or pulled the kinks out, but instead of doing that he turned the water on first. Evidently then, in the mind of the Court, these mythical kinks were in the hose before the water was turned on.

Then Valle must have gone to the hose first, thrown it down and got kinks in it, then have gone to the valve and turned the water on, and then come back to the hose and pulled at it to get the kinks out.

If the defendant had left longitudinal gangways in the line of the hydrants, as we insist the jury had a right to infer it was negligence not to do, Valle would not have been on top of the bales of cotton at all, but would have been stretching that hose in such longitudinal gangway, or pulling it *down* to the floor of the dock from the platform on which it was coiled, instead of trying to pull it *up* from the platform and carry it over the tiers of cotton to the place of the fire.

(*f.*) No water would come through the hose. One would suppose that the natural, primary inference to be drawn from this fact, was either that the pressure of water (concerning which there was *no* evidence), was insufficient, or that the fire apparatus was in some other respect out of order. There is no syllable of proof here to show that if Valle had had a clear line of hose, leading directly from the hydrant to the fire, any water would have come out of it. As it was, to reach the fire, the hose had to be carried up over high piles of cotton, and then across such piles of cotton; whether any water would have run out of the nozzle under such conditions, even if not tangled, does not appear.

In any event, we submit that it is not the law that when apparatus exclusively managed and controlled by the defendant, designed especially to extinguish fire, is found to be in such a condition that it will not work in the hands of those employed by defendant to work it, the *Court* can say that there is nothing in such fact which would justify a jury in inferring negligence.

(*F.*) Turning now to a consideration of the opinion of the Court of Appeals (pp. 207 to 210), it appears that that Court wholly ignored the contentions of the plaintiffs that they had the right to go to the jury on the questions whether the proper number of watchmen had been employed to guard against, or extinguish fire in one million dollars' worth of property; whether if on a cry of fire by Valle, the defendant should not have had more than one "large and very stout man" to come to his assistance; whether the defendant might not have gone to the length of having barrels full of water near the hydrants, with buckets handy, or perhaps a fire extinguisher or two somewhere about the wharf; or a hose so stretched or reeled that it could not become tangled in handling it; or gangways running lengthwise in the centre of the shed, leading from one hydrant to another, and many other facts which the plaintiffs claimed might justly lead to the conclusion of negligence.

(1.) The Appellate Court says the fire

> "was discovered immediately, but spread so rapidly that all efforts to extinguish it were unavailing,"

but fails even to indicate why, when the aforesaid "all efforts" consisted of an old man and a boy tugging in the darkness under the sheds at a tangled hose, the plaintiffs were not entitled to ask a jury whether such efforts were sufficient efforts, though in a later part of its opinion it says

> "that the defendant, by keeping a larger force of watchmen at its wharf, might have more efficiently protected its property from risk is a fact that may be assumed to be proved by the evidence."

(2.) The only alleged act of negligence which that Court considered worthy of consideration was not, it says, in fact, negligence, but simply an error of judgment on the part of one of defendant's employees,

for which it was not liable, and this error of judgment consists, it is said, in Valle turning on the water before he straightened out the hose.

The statement of the Circuit Court of Appeals is that—

> "The evidence upon the second issue, introduced for the purpose of showing that the fire should have been extinguished earlier, merely *tended to prove* that it could and *probably* would have been extinguished earlier *if an employee* of the defendant *had not in a moment of excitement and peril failed to exercise the good judgment of a deliberate occasion*" (p. 209).

And those acts of this employee, in the doing of which he is said to have failed to exercise good judgment, are stated by the Court as follows:

> "The watchman who discovered the fire immediately ran to the hydrant, turned on the water, uncoiled part of the hose, clambered up on top of the bales, carrying the end of the hose and directed the hose upon the fire, but the water would not run from the nozzle." * * * (p. 209).
>
> "*The evidence indicates* that the hose had become kinked while the watchman was carrying it to the place of the fire and that *the water in it made it so heavy and cumbrous that it could not be straightened out in the few seconds available so as to permit the water to escape. This probably would not have happened if the requisite length of hose to reach the fire had been unwound from the post and straightened out before the water was turned on.* This, however, would have involved delay, and seconds were precious. There was a chance that what did happen would happen, but we do not think a jury would have been justified in finding that the watchman was in fault for not anticipating and providing against the contingency" (p. 209).

We have shhown that the evidence in the case at bar, instead of indicating, as said by the Circuit Court

of Appeals, "that the hose became kinked while the watchman was carrying it" (p. 507), or, as stated by the Circuit Court, that the hose became kinked by being thrown down either accidentally or intentionally by Valle (p. 164), established the fact that the hose was tangled—not kinked.

There is no evidence to show at what point in this one hundred feet of hose the tangle occurred, or to show that the hose was not tangled before Valle first saw the fire. *There is no evidence to show that Valle had not actually tried to straighten out the hose before he discovered that it was tangled, nor is there any evidence to show that he turned on the water first; indeed it does not even appear that he turned it on at all*, for the mere fact that it was turned on when Robeau got there does not establish the fact that Valle turned it on. All that does appear is that Valle, standing with the hose in his hands, called to Robeau to turn on the water, and that Robeau went to the valve, found the water turned on and the hose leaking. But Robeau did not know who turned on the water (p. 159). *There is absolutely no evidence to show that Valle in any way caused the tangle in the hose*, or that the pressure of water tangled the hose, or how it was tangled or where it was tangled. When Robeau got to Valle THEY COULD GET NO WATER THROUGH THE HOSE. Both of them together were unable to untangle it from where they were on top of the cotton, and neither would go down on the platform to try and fix it.

An insuperable difficulty with the statement by the Court that Valle made an error of judgment is, then, we respectfully submit, that *there is absolutely no evidence to show what this watchman Valle did between the time of the discovery of the fire and the time when he was found by Robeau standing on the cotton pulling on the hose* (see testimony of Robeau, pp. 151, *et seq.*).

Valle was not called, and no one was called who

saw what Valle did or testifies to what he said he did.

The statement of the Court of Appeals that Valle, the watchman who discovered the fire, "immediately ran to the hydrant, *turned on the water, uncoiled part of the hose*, and clambered up on top of the cotton carrying the end of the hose," is wholly conjecture; is not a statement of a fact contained in the testimony, but *is simply a statement of the Court's belief or inference as to what he did.*

But if it had appeared what Valle in fact did, it would have been for the *jury* to say whether Valle did, in fact, make an error of judgment. And if they had found that Valle had made an error of judgment, would it not have been for them to say whether such error of judgment was the cause of the loss? They might have found, as the plaintiffs think very justly, that no water would have come out of the nozzle even if the hose had been straightened out. In any event, it was for the *jury* to say.

The decision of each of the Courts below was based on *the inference, which they drew* from the testimony, that Valle turned on the water before he tried to uncoil the hose. Each Court then drew the inference that this was an error of judgment. Each Court then drew the inference *without any testimony to support it* that if he had not done this, but had uncoiled the hose before he turned on the valve, plenty of water would have resulted and the fire been extinguished.

But the law is well settled that

> "*If the fact is to be inferred from the evidence, it must be drawn by a jury, not by the Court.*"
>
> *Bolton* v. *Baxter*, 58 *N. Y.*, 411, *at p.* 415.

> "The presumption of the existence of one fact from the existence of another, that is, the process of ascertaining one fact from the proof of another fact, is within the exclusive province of the jury."
>
> *Justice* v. *Lang*, 52 N. Y., 323, at p. 328.

See also

Hackford v. *N. Y. C. & H. R. R. Co.*, 53 *N. Y.*, 634.

Bernhard v. *Rensselaer & S. R. R. Co.*, 1 *Abb. Ct. of App. Decs.*, 131.

The conclusion of both Courts below was that Valle failed to exercise good judgment in doing what both Courts *infer* that he did.

But, said the Court in *Bernhard* v. *Rensselaer & S. R. R. Co.* (*supra*), after holding that such inferences can only be drawn by the jury,

> "If it is necessary to determine, as in most cases it is, what a man of ordinary care and prudence would be likely to do under the circumstances proved, this involving, as it generally must, more or less conjecture, can only be settled by a jury."

An error of judgment implies, of course, a possibility of two courses.

The error of judgment which the Court finds as a fact, without support from the evidence or authority in the law, is that Valle should have straightened out the hose before he turned on the water.

But there is absolutely no testimony that Valle could have done this, and there is nothing in the testimony to show that he did not try to do this and find it impossible. There is nothing in the testimony to show that this was not the very thing that he was trying to do when Robeau reached him.

In order, then, to reach the conclusion that this error of judgment was made by Valle, the Appellate Court

First. Draws inferences which should be drawn by the jury only.

Second. Draws inferences which are wholly unsupported by the evidence.

Third. Blames Valle for not doing a thing which there is no proof he did not attempt to do and failed.

Fourth. Concludes that if Valle had done what the

Court thinks he ought to have done, the fire would *probably* have been extinguished.

We should not omit to state that the Court of Appeals, in reaching its conclusion of an error of judgment committed by Valle, was perhaps led into this error by such statements in the brief below on behalf of the defendant as these:

> "The testimony shows that Valle had opened the valve, and that the water was pressing out into the hose to such an extent that both Valle and Robeau together were unable to straighten the hose so that the water would come through the pipe which Valle had in his hand * * *."
>
> "Supposing that before opening the valve, Valle had anticipated that which evidently occurred, that the pressure of water would be so strong that he would be unable to pull the hose apart and straight when the water was thus let into it, he had straightened the hose in advance," &c.
>
> "Valle, not anticipating that which did happen, a greater pressure of water in the hose than he had foreseen, and thereby entirely choking the flow of water through the hose," &c.

The testimony gives no warrant for any such assertions.

(*c.*) Admitting for the purpose of the argument the rule sought to be here applied by the Court of Appeals, that the defendant is not liable for a mere error of judgment of its employee, we insist that in the case at bar, unlike any of the cases cited by the Court of Appeals, there are absolutely no facts proved tending to establish the commission of an error of judgment, and that if there were, *it was the province of the jury upon all the evidence to draw the inferences therefrom.*

The province of the Court, if it had been known what Valle in fact did, was at most to instruct the jury on this branch of the case as to what con-

stituted an error of judgment, and to tell them that if from all the facts they believed that the failure to extinguish this fire resulted solely from an error of judgment committed by Valle, the defendant was not liable therefor.

The Court could not properly instruct the jury as to what inference they must draw from the facts, and could only direct a verdict for defendant

> "when the evidence given at the trial, *with all the inferences which the jury could justifiably draw therefrom,*"

would be insufficient to support a verdict for the plaintiffs.

> *Schofield* v. *Chicago, M. & St. P. R. Co.*, 114 *U. S.*, 615.

(*d.*) The quotation from the case of *Thurber* v. *Harlem R. Co.*, 60 *N. Y.*, 336, cited by the Circuit Court of Appeals, was a mere statement of a rule said to be in harmony with a decision in that case, but that rule has no application to the case at bar *until the jury shall have drawn the inference that an error of judgment was committed.*

This case is an authority for our contention that *it was for the jury*, and not for the Court, *to determine what Valle did and whether or not, in the doing of those things, he committed an error of judgment.* In that case, in discussing the question as to whether or not the plaintiff was guilty of contributory negligence in attempting to cross in front of the defendant's car, the Court said:

> "Negligence is a question of fact and should usually be decided as such, especially whenever men of ordinary prudence and discretion might differ as to the character of the act, under the circumstances of the case, the positions and conditions of the parties. If the plaintiff had been of maturer years and of ripe judgment it would still have been a question for the jury whether it was prudent and proper for him, in the exercise of that ordinary care which he

> was called upon to use, to attempt to cross the street in front of the defendant's car. The actual result does not necessarily condemn the act as rash, or even negligent. *It may only prove an error of judgment, and in such case it is for the jury to say whether a man of ordinary prudence and discretion might not, under the same circumstances, have formed and acted upon the same judgment.*"
>
> *Thurber* v. *Harlem &c.* (*supra*).

The case of *Union Pacific R. R. Co.* v. *McDonald*, 152 *U. S.*, 281, was cited by the Court of Appeals merely as approving the statement taken from the Thurber case.

In *Winn* v. *Railroad Co.*, 133 *N. Y.*, 575; *Bitner* v. *Crosstown Railway Co.*, 153 *N. Y.*, 76, and *Stakeman* v. *Railroad Co.*, 155 *N. Y.*, 511, all cited by the Court of Appeals, and in the subsequent case of *Lewis* vs. *Long Island R. R. Co.*, 162 N. Y., 52, it was decided that the companies were not liable for an error of judgment. But in each one of these cases *the acts of the employee were proven, known or admitted, and the holding of the Court was that his failure to do other things was a mere error of judgment.*

Those cases can have no application to the case at bar, however, because in this case the acts of the employee were not proven, known or admitted; *it was not proven that Valle did not find the hose badly tangled, nor was it proven that he did not manage the hose in the most skillful manner and in the manner in which any reasonable man would have done*, in which event its absolute failure to work would have been evidence of negligence, and in no sense of an error of judgment.

In its brief below the defendant said:

> "To submit the case to the jury to determine what Valle did before Robeau got there, is, in view of what Robeau states respecting the situation of affairs, to allow the jury to guess as to what occurred, is to allow them to proceed upon conjecture and surmise and uncertainty."

The defendant here admits that what Valle did before Robeau got there is unknown. This admission completely undermines the position of the defendant, for, as we say, the Court, admitting for the purposes of the argument that it had any right to draw any inference at all on the subject, could not draw the inference of an error of judgment in Valle, when it did not know what Valle did.

(c.) But in any event, it cannot be said that an error in judgment in Valle would relieve the defendant, until the defendant had shown that Valle was an experienced person in the business in which he was employed. Valle may have been a good watchman; he may have answered the purpose to scare off thieves—but what kind of a fireman he was does not appear.

A railway company may perhaps be relieved from the consequences of a collision of its locomotive, if it shows that upon such locomotive it had an experienced engineer, and such engineer made, in the opinion of the jury, a mistake in judgment which was the cause of the accident; but should it appear that on that locomotive as an engineer, the railway company had employed Valle, or any other youth who had never run an engine before, how can it be said that any act of such inexperienced youth so placed, was an error of judgment in a moment of peril? That to run locomotives without negligence a railway company must employ men skilled in the business, is too clear a proposition for discussion. It is no less incumbent upon a railway company to employ skilled men to put out fires in cotton, or at least the jury should have had the opportunity to say whether Valle and Robeau were proper men to have been employed. The defendant here is surely chargeable with the special knowledge that if a fire started in this mass of cotton on this wharf on November 12th it was all the more dangerous from the manner in which these bales of cotton were piled and crowded and jammed

together; that under such circumstances the fire was very much harder to get at and very much harder to handle. To say that the boy Valle, not shown to have had the slightest experience in handling fire apparatus of any kind or extinguishing fires in cotton, made an error in judgment, and that if such alleged error of judgment had not occurred the loss would not have happened, is, in any event, we submit, wholly untenable.

(*G.*) The contention of this defendant in the courts below, that to send this case to the jury would have been to leave it to be determined by mere guess or conjecture, is not sound.

> "It was objected by the learned counsel for the appellants that this evidence [*i. e.*, opinions of witnesses as to the cause of the giving way of an embankment] amounted only to theory and conjecture, and that the jury ought not to have been permitted to act upon it. To this it may be answered, that although the circumstances which occasioned the accident were facts to be proved, yet the causes which produced this state of circumstances were necessarily matters of opinion and judgment."
>
> *Great W. R. Co. of Canada* v. *Braid, and Same* v. *Fawcett*, 1 *Mo. P. C.* (New Series), 101, at p. 116.

Even on the single question of the condition of the fire apparatus, leaving out all other considerations, in the case at bar the failure of the hose to work was proved, but the causes which produced this failure could only be determined by the jury.

In its brief below, the defendant further said:

> "If the transaction can be explained upon the theory of an error of judgment, then the plaintiff is not entitled to go to the jury. If it is equally explicable upon the theory of negligence, or upon the theory of an error of judgment, or mistake, they are equally not entitled to go to the jury."

The language of the New York Court of Appeals in *Hart* v. *Hudson River Bridge Co.*, 80 N. Y., 622, is particularly applicable on this point to the case at bar. It is as follows:

> "While in an action to recover damages for the death of one who fell from defendant's bridge and was killed, through defendant's negligence, it was incumbent upon the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of death, it was not necessary to do this by positive and direct evidence of the negligence of defendant and of the freedom from negligence of the deceased. *Circumstances may be shown from which an inference of the necessary facts may be drawn, and when the circumstances are such that the inferences to be drawn are not certain and incontrovertible, but may be differently made by different minds, it is for the jury to determine them* (Justice *v.* Lang, 52 N. Y., 323). And it is not necessary to warrant this Court in adjudging that there was error in granting a new suit, to be convinced that the legal probabilities are so strong as that the plaintiff is entitled to a verdict. What it has to arrive at is that there were facts in the case which were not so weak as to give no support, in some fair and sound mind, to such legal probabilities as that the law will tolerate that a verdict should be founded upon them."

See also

Quaife v. *Chicago & N. W. R. R. Co.*, 48 *Wis.*, 513, 519–520.

Whitney v. *Clifford*, 57 *Wis.*, 156.

The same rule is stated in equally strong terms in *Seybolt* v. *N. Y., L. E. & W. R. R. Co.*, 95 N. Y., 562, the Court saying:

> "*We are not aware of any rule applicable to the trial of issues of fact in civil actions which requires a party upon whom the burden of proof rests to establish a case free from reasonable doubt.*"

(*H.*) Were it essential to the plaintiffs' position to show that, in the absence of evidence by the defendant, they were entitled to a direction of a verdict, the following cases would support this contention:

> "A presumption of negligence from the simple occurrence of an accident seldom arises *except* where the accident proceeds from an act of such a character that when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or *where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control and for the management or construction of which he is responsible.*"
>
> *Transportation Co.* v. *Downer*, 11 *Wall.*, 129.

Or as stated in *Scott* v. *London Dock Co.*, 3 *Hurl & Root*, 596:

> "There must be reasonable evidence of negligence. *But where a thing is shown to be under the management of the defendant or his servants, and* THE ACCIDENT IS SUCH AS IN THE ORDINARY COURSE OF THINGS DOES NOT HAPPEN IF THOSE WHO HAVE THE MANAGEMENT USE PROPER CARE, *it affords reasonable evidence* in the absence of explanation by the defendants *that the accident arose from want of care.*"

The case last mentioned was distinguished by the Court in Transportation Co. *v.* Downer (*supra*), on the ground that the grounding of the propeller, the alleged negligence in that case, "may have been consistent with the highest care and skill of the master," but we apprehend that the fact that this hose in an emergency such as was reasonably to be expected, and in the hands of the men especially selected to work it, was found to be in such a condition as to absolutely prevent its use, can hardly be said to be "consistent with the highest care and skill" on the part of this defendant.

See also *Hicks* v. *New York, &c., Railroad*, 264

Mass., 424, at p. 427, holding that the failure of electric bells to ring at the approach of a train was evidence of negligence; and *Kennedy* v. *McAllaster*, *31 App. Div., 453*, holding that the falling of an elevator *while being used for the purpose for which it was intended would be evidence it was defective and unsafe, and if not satisfactorily explained, would be sufficient evidence to authorize the jury to find negligence.*

Scott v. *London Dock Co.* (*supra.*)

In this connection we beg to call the attention of the Court to the most recent review in the New York Court of Appeals, of this question of *res ipsa loquitur*. It is given in the case of *Griffen* vs. *Manice*, *166 N. Y., 188*, where the opinion is written by Cullen, *J.*

The recent authorities and text books are there reviewed in a lucid manner, and under the authority of this and preceding cases, we submit that it is clear that in this case a presumption of negligence arose, and that the *plaintiffs* were entitled to the direction of a verdict.

Second Point.

The taking of the cotton in suit to Westwego and its detention at that point, for the purpose of there making delivery thereof to the steamship line, constituted a deviation from the regular and usual course of transportation, and the defendant thereby forfeited all exemptions in its favor contained in the bill of lading, or at least the plaintiffs were entitled to go to the jury on the question whether such treatment of the cotton was so well known, through com-

mercial custom of long standing, or so general or so universal, as to be fairly within the constructive knowledge of the shippers.

A deviation, said this Court in *Hostetter against Park*, 137 *U. S.*, 30, at page 40,

> "is defined to be 'a voluntary departure, without necessity or reasonable cause, from the regular and usual course' of a voyage."

And the rule of law is well settled

> "that by deviating from the manner of the carriage the carrier loses the benefit of any exemption in his contract."
>
> *Lawson on Carriers, Sec.* 139.
>
> *Hutchinson on Carriers, Secs.* 340 *et seq. and cases cited.*
>
> *Crosby* v. *Fitch*, 12 *Conn.*, 410.
>
> *Express Co.* vs. *Kountze*, 8 *Wall.*, 342.
>
> *Maghee* v. *R. R. Co.*, 45 *N. Y.*, 514.

And

> "No rule is better settled than that the delivery must be according to the custom and usage of the port."
>
> *Constable* v. *National Steamship Co.*, 154 *U. S.*, 51, *at p.* 63.

The shippers of this cotton, therefore, had

> "a right to expect a delivery of their goods according to the *established* custom and usage of the port, *and in that part of the port customarily used for the discharge [delivery] of such goods; and the vessel [this defendant] is bound * * * to make delivery accordingly.*"
>
> *Derato* v. *823 Barrels of Plumbago*, 20 *F. R.*, 510, *at p.* 516.

(4.) It appears, of course, that the deviation was material, for the cotton was destroyed at Westwego,

See Vos *vs.* Robinson, 9 John., 192.
Fernandez *vs.* Great Western Ins. Co., 48 N. Y., 571.

and would not have been destroyed if it had been taken to New Orleans.

(*B.*) Westwego not being mentioned in the bill of lading, if it was not, by established custom and usage, that part of the port of New Orleans customarily used for the transfer of shipments from one carrier to another, and if the taking of this cotton to Westwego was not according to the established custom and usage of the port, but constituted a voluntary departure, without notice to the plaintiffs, and without necessity or reasonable cause, from the regular and usual course of transportation, the defendant must likewise be held to have lost the benefit of all the exemptions in the bill of lading contained.

In *Reiss* v. *Texas & P. R. Co.*, *98 F. R.*, *544*, it was said, by the Circuit Court of Appeals:

> "The plaintiff in error also made the point that by the bill of lading the cotton was to be delivered at the port of New Orleans, and that, therefore, the defendant had no right to unload it at Westwego. It is true that Westwego was not, in 1894, within the boundaries of the port of New Orleans, as defined in the Statutes of the United States, but it was, so far as export cotton is concerned, that port in the well understood commercial and business sense, and was the part of the port of New Orleans where steamship companies rightfully expected to receive cotton from Texas for transportation to Europe."

This statement of the Circuit Court of Appeals, that Westwego was within the port "in the well understood commercial and business sense" is not, we contend, warranted by the evidence in this case.

By the whole record herein, the existence of certain facts relative to the business done by this defendant at Westwego is clearly established, viz.:

(1) The bill of lading was on a form to take effect July 1, 1893 (p. 169), two months before the first cotton was ever delivered from Westwego.

Prior to September, 1893, it was the defendant's universal custom and usage as to *all of the cotton shipped over its road* "to the port of New Orleans," to be from thence transported to foreign ports, was to transport such cotton to New Orleans, on the New Orleans side of the river and to deliver it to the steamships at the City Front.

(2) That after September, 1893, and solely by reason of certain arrangements made by it with the various steamship lines in New Orleans, *which, however, were absolutely unknown to the shippers,* the defendant took its *export cotton only* to Westwego and make delivery of it there, provided it should accumulate a certain number of bales at that point, it being expressly understood that *no delivery could be made there except under the conditions specified.*

The testimony of Sanders, one of the agents for steamships, *as to the contracts made by defendant and the use therein of the words "delivery unrestricted,"* is

> *"This is a peculiar form of delivery which is used only by the Texas and Pacific railway and certain connections of theirs in Texas. The usual form of engagement note calls, as a rule, for a certain date of delivery to the vessel"* (p. 109).

See contracts covering shipment in suit (pp. 176 and 177).

(3) That since September, 1893, defendant had made an arbitrary division of the cotton coming over its road "to the port of New Orleans" carrying only its "export cotton" to West-Wego, while it continued to carry its "east bound" and other cotton to New Orleans as it had always theretofore carried all its cotton.

(4) That notwithstanding these peculiar arrangements under which *alone* delivery of export cotton would be accepted by the ships at Westwego it was

still the custom at New Orleans in 1894, the time of this fire, for defendant, if it had less than one thousand bales of cotton (in some cases more) to deliver to the ships, to carry them to New Orleans and there deliver them, or else hold them at Westwego until it should accumulate enough more bales at that point to enable it to procure the sending of a ship to take them, and that the custom of carrying cotton to the city front still obtained in 1894 as to all cotton which the steamship lines had not agreed to receive at Westwego under one of the special contracts.

(5) That these arrangements, under which cotton was carried to Westwego, were absolutely unknown to the shippers; and

(6) That in accordance with the custom in force at New Orleans in 1894, as of which time only we must consider this case, the defendant was bound to carry these 100 bales of cotton to New Orleans and there deliver it to Elder, Dempster & Company, and that in accordance with this custom it would have done so had it not been for the fact that its contract with this line, under which it proposed to deliver this cotton, provided for "delivery unrestricted" (p. 176), thereby enabling defendant to carry this shipment to Westwego, there to be held until it could get together the 2,000 bales necessary for it to have there before Elder, Dempster & Company would send a steamer there to accept delivery of it.

It must be borne in mind that the steamship companies never knew what particular shipment of cotton was to be delivered to them by the defendant under one of these special contracts until, after the cotton had arrived, the defendant sent them a notice of arrival and a specification of what contract the cotton was to be carried under, and notwithstanding the contract between defendant and Elder, Dempster & Company, referred to in the bill of lading simply as "T. & P.

No. 73" (p. 169), this defendant would have had a clear right to deliver this cotton in New Orleans. There is nothing to show that this contract, "T. & P., No. 73" (pp. 176 and 177), applied to this cotton specifically. It was simply a contract for 3,000 bales, absolutely unidentified, and the Steamship Company could not have refused to accept a delivery of this cotton in New Orleans "on the steamship pier at the said port" (bill lading, clause 12, p. 172) if delivery had there been tendered.

> "The company [defendant] had no right to assume, in discharge of its obligation, * * * that an offer to deliver this particular shipment would have been met by a refusal to receive."
>
> *Railroad Co.* v. *Manufacturing Co.*, 18 *Wall.*, 318, *at p.* 325.

We concede, at the outset, that in 1894, only one season after the erection of this dock at Westwego, most of the steamship lines went to Westwego to receive export cotton, and that at that time most of defendant's *export* cotton was delivered at that point.

But we contend that this method of delivery by virtue of these secret arrangements between the defendant and the steamship lines, absolutely unknown to the shippers, was not notorious, and had not been so long established or become so well known and understood as to change the custom and usage theretofore observed by this defendant in carrying all its cotton to New Orleans and there delivering it.

We concede also that it was customary for the steamships to go to other railroad terminals in New Orleans for cotton. Under what arrangements they went there, and under what bills of lading cotton so delivered was shipped, does not, however, appear, and it is established that, with the possible exception of the preceding season, defendant's terminal for this class of cotton as well as for all other freight was in New Orleans, and that all deliveries were made there.

These shippers, when contracting for the carriage of this cotton "to the port of New Orleans," there to be delivered to the steamship line, were entitled to assume and *must be presumed to have understood that such cotton would be carried to the City of New Orleans, and there delivered to the steamship line* WITH ALL REASONABLE DESPATCH, at which place it would, during the interval between its arrival and its departure on the ship, be under the protection afforded by the fire and police departments of the City of New Orleans. Hence the taking of this small shipment of 100 bales to Westwego, a point at which it had absolutely no fire and police protection, except such as this defendant choose to afford it, and its detention at that point for five days (from November 7th to 12th, p. 29), during which time no attempt to even unload it was made (p. 29), constituted a material deviation of which defendant must bear the consequences.

We do not, as the Circuit Court of Appeals seems to have inferred in the *Reiss* case, question the right of these carriers to agree between themselves, to send the steamers to Westwego, if they chose to, nor, in view of the contracts which existed as between defendant and these companies—peculiar contracts only used by this road—do we question the right of these steamship companies to expect to receive at Westwego cotton covered by these contracts, and to be transported by them to European ports. The practice of the parties as between themselves, *has, however, nothing to do with the contracts of carriage so far as these shippers are concerned.*

What we do contend is that the sudden diversion, during only one season, of export cotton *only* to Westwego, "*an out of the way place*" (p. 135), by defendant, alone, out of the many competing lines of railroad centering in New Orleans—the greatest cotton mart in the United States—while it continued to carry all its other cotton to New Orleans, such diversion being made solely by virtue of certain special arrangements peculiar to

this road and made at defendant's request and for its sole benefit, between itself and these steamship companies, *wholly unknown to the shippers*, the making of which was necessary in order to enable defendant to make deliveries of export cotton at Westwego, was not a carriage in accordance with the regular and usual course of transportation, or in accordance with the terms of a bill of lading calling for transportation to the port of New Orleans, and did not operate to change the custom which had theretofore been universal, viz., to carry all cotton directed "to be carried to the port of New Orleans," to the City of New Orleans, and to make delivery thereof at the City Front.

The permanent Committee which drew this Bill of Lading to go into effect on July 1, 1893, evidently did not contemplate any delivery at Westwego, or the bill of lading would have mentioned it. The testimony shows that, up to the fall of 1893, a delivery of cotton consigned to the port of New Orleans could not physically have been made at Westwego.

No one ever considered Westwego as commercially within the port of New Orleans. In 1894 the merchants of New Orleans did not consider it as in the port, and the steamship agents, *the only people who had anything to do with Westwego*, did not consider it as being in the port *except* for more than 1,000 bales of cotton, and would not go there, and could not be forced to go there, for less than that amount.

Therefore, we insist that when these shippers received this bill of lading calling for the carriage of only 100 bales of cotton "*to the port of New Orleans, La.*," there to be delivered to the steamship, they were entitled to rely, and did rely, on the fact that those words *meant*, as they had always theretofore meant, *the City of New Orleans*, which was the place wherein ships and merchants were accustomed to receive and deliver such shipments, and to which place, by the custom of the port, these 100 bales would have to be carried before a tender of de-

livery could be made, which, as to a shipment of only 100 bales, it would be obligatory on the steamship line to accept.

In this connection we call the attention of this Court to the map inserted in and made a part of their opinion in *New Orleans* vs. *Texas and Pacific Railway*, 171 *U. S.*, 312, *at page* 335, which shows in accordance with the testimony in this case the whole situation as to the commercial limits of the port of New Orleans, and upon which are shown the line of defendant's railway from Westwego, eight miles down to Gouldsboro, opposite the Texas and Pacific depot in New Orleans; the location with reference to Westwego of the "S. S. wharves," the "Stuyvesant docks" and the "commercial front."

Westwego was not within the legal limits of the port of New Orleans. *It was expressly conceded by defendant, on the trial,*

> "*As a matter of fact, that the east bank of river in the city of New Orleans is the port of New Orleans*, AND WAS THE PORT OF NEW ORLEANS IN 1894" (p. 9),

and also

> "that prior to March 20, 1896, it (Westwego) was not within the designated limits of the port of entry, the customs district, as defined by the act of Congress" (p. 9).

In order, therefore, to enable this defendant to successfully maintain its contention that it was entitled to carry this cotton to Westwego and hold it there for delivery until other cotton accumulated there, when, by the express terms of the bill of lading it was to be carried "to the port of New Orleans," a practice of so taking and holding cotton must be shown, which was so open and notorious and had become so general and so well established as to be fairly and reasonably presumed

to be recognized by shippers generally, otherwise *these shippers who had no knowledge of Westwego and no notice of defendant's alleged practice will not be bound by it.*

Devato v. 823 *Barrels of Plumbago*, 21 F. R., 510.

(Wacco v. Bailey, 49 L. R. A. 464-476 re.

But as shown above, this alleged practice did not exist at all prior to the Fall of 1893, between which time and the time of this fire only one cotton season had passed.

Miller, defendant's main freight agent, testified regarding deliveries to Elder, Dempster & Company, the line which was to carry the cotton in suit, as follows:

> "Q. You were enquired of respecting Elder, Dempster & Company's wharf, in the City of New Orleans; was it the custom of the Texas and Pacific Railway Company to ever deliver cotton to Elder, Dempster & Co. at that wharf? A. At times.
>
> Q. That is *what kind of cotton or nature or sort of shipments were delivered to Elder, Dempster & Co. in New Orleans?* A. *Practically the same class of cotton as that we were handling at Westwego;* but it was not the custom to make deliveries at that wharf of Elder, Dempster & Company in the city at that time. At that time we were handling their business at Westwego.
>
> Q. And for how long had you been handling it at Westwego? A. Probably for a month or a month and a half previous to the fire, as to that particular season of 1894-95. It had been so handled the previous season at Westwego" (p. 31).

An analagous case is *The Sultana* v. 3,000 *Empty Oil Barrels*, 15 *F. R.*, 618, in which case it appeared that on August 20, 1881, 7,061 empty petroleum barrels were shipped on the *Sultana*, the bill of lading stipulating that the same should be delivered at "*the port of Philadelphia*," at a wharf to be selected by the consignees. The Chester Oil Company was

See also Am. & Eng. Ency. of Law, Vol. 27, pp. 710-718-721, & cases cited.

established in March, 1881, and a large proportion of the barrels afterwards consigned to the port of Philadelphia were discharged at Chester. The *Sultana* arrived at the City of Philadelphia on September 20, 1881, and was requested to go back and discharge at Chester. This the master refused to do, and thereupon discharged at a wharf in Philadelphia and filed a libel for freight.

The respondent claimed that *one-third of the oil business of the port was done at Chester*, and that it was a custom of the port to discharge at that place. The libellant contended that a custom of five months was not sufficient to affect its contract, and the Court said:

> "The defense is not sustained. Upon arrival of the cargo at Philadelphia, where the charter required it to be brought, the respondent ordered it brought back to Chester, several miles below, claiming a right to do so under the contract. Conceding Chester to be without the limits of Philadelphia, the respondent sets up a custom which, he says, required it to be treated as within, where the particular commerce to which this contract relates is involved.
>
> Without entering upon a discussion of the subject, it is sufficient to say that no such custom existed at the date of this contract; whether one exists now, need not be considered. In the case under consideration the proof is insufficient. That many outward-bound vessels under contract to carry oil from Philadelphia had, within two or three months preceding the date of this charter, loaded at Chester, and inward bound vessels loaded with oil or oil casks, had reloaded there, is unimportant. In each instance Chester was directly on the way, and a request so to load or unload tended to the carrier's relief, and would therefore be favorably received. No instance is shown of a vessel carrying her cargo back to Chester under such a contract."

In the case at bar the alleged custom, it is true, had been in existence a few months longer than that in the case cited, but it is also true that in the case at bar the alleged custom affected only a single class of shipments, viz., "export cotton" brought to New Orleans over the line of only one of many railroads, whereas in the case cited it was contended that one-third of all the oil business of the port was done at Chester.

Philadelphia was situated on a river, as is New Orleans, with Chester several miles below, as, in the case at bar, Westwego is several miles above. As was said by the Court in *The Sultana* "no instance is shown of a vessel carrying her cargo back to Chester," so in the case at bar no instance is shown of any vessel being sent up to Westwego for a shipment of 100 bales of cotton, and no instance is shown of a vessel ever going there except by special contract and under the peculiar and express conditions as to quantity above set forth. The alleged custom set up by defendant in the case at bar was no stronger than that in the case cited, and, as in that case, should not be allowed to afford protection to the wrongdoer.

The determination of the commercial meaning of the words "Port of New York" was among the questions discussed and answered by Judge Brown in *Devato* v. *823 Barrels of Plumbago*, 20 *F. R.*, 510 (cited *supra*), and the reasoning of the learned Judge in that case, long recognized as the leading authority on this subject, seems to us to be decisive in plaintiffs' favor, of this point.

In that case plumbago was brought from Ceylon and discharged at Pierrepont's Stores, Brooklyn, immediately adjacent to Wall Street Ferry. The plumbago was shipped under a bill of lading which described the bark as "bound for New York," and that the goods were to be "delivered at the aforesaid port of New York." The single question presented concerned the right of the vessel, under such

a bill of lading, to make delivery of the cargo in Brooklyn, and the Court says:

> "For some thirty years past there has existed at this port a controversy, or something in the nature of a controversy, between ship owners and importers as to the right of a vessel to make delivery of cargo consigned to 'the Port of New York' on the adjacent shores of Brooklyn, Jersey City or Hoboken. The evidence shows that it began some thirty or thirty-five years ago, about which time some of the steamship lines began to go to Jersey City. Complaint was immediately made by the merchants in regard to that practice, and some compensation was paid for the extra expense of ferriage. This liability was soon avoided by an alteration of the terms of the bills of lading, so as to give liberty to discharge at Jersey City; and several lines now provide generally for an option to discharge at Jersey City, Hoboken or New York. About the same time commodious warehouses began to be erected in Brooklyn, which now extend almost continuously from Fulton ferry to below Hamilton ferry, on the Brooklyn side. These warehouses, with the docks to which they are adjacent, furnish superior facilities for the ready handling and storage of cargo; and *during the last twenty-five years they have been more and more used* for storing goods not intended for immediate consumption. In certain lines of business, the East India trade particularly, *a large majority of the cargoes of late years have come to be discharged at the Brooklyn stores;* and this tendency has lately been still further increased by the erection of the Brooklyn Bridge, as the vessels engaged in that trade are mostly unable to go above the bridge without housing their topmasts. DURING THE LAST FIVE YEARS, as the evidence shows, ALMOST ALL THE VESSELS FROM COLOMBO AND CEYLON HAVE DISCHARGED AT BROOKLYN. * * *
>
> Many witnesses for the libellants testify to the practice of late years of landing nearly all the cargoes from Ceylon at Brooklyn, as above stated. * * *
>
> The first ground of defense is that a delivery

at Brooklyn is not a fulfillment of the contract contained in this bill of lading, because the bill of lading describes the vessel as 'bound for New York,' and makes the goods deliverable 'at the aforesaid port of New York.' If this contention is sound no freight was earned (*The Boston*, 1 Low, 464). This contention, however, cannot prevail for the wharves are clearly within the legal limits of the 'port of New York,' and hence within the possible limits of the port, as commercially understood.

* * * * *

2. It does not follow, however, that a delivery of cargo is necessarily a good delivery because within the legal limits of the port. Such is not the meaning or intention of the bill of lading. *No one would seriously contend that under a bill of lading like this goods consigned to a merchant in New York City could be lawfully delivered at Spuyten Duyvel, some thirteen miles above the Battery, at the mere option of the captain, because Spuyten Duyvel is within the geographical limits of the city and port of New York, or at Throg's Neck, or at Sandy Hook, because those places are also within the legal limits of the port.*

A bill of lading is a commercial document, to be interpreted according to the usages of commerce. * * * *The port is not any place within the geographical limits of the same name where ships might load and unload, but where they in fact do so, i. e., where they are accustomed to do so.* Commercially considered, a port is a place where vessels are in the habit of loading or unloading goods; *and the limits of the port, as respects a delivery under the bill of lading, turn purely upon the question of fact, within what limits ships and merchants have been accustomed to receive and deliver cargo consigned to the port designated*, without any necessary regard to geographical or political divisions, or to police or statutory regulations. *Consignees of goods at a designated port have a right to expect a delivery of their goods according to the established custom and usage of the port, and in that part of the port cus-*

tomarily used for the discharge of such goods, and the vessel is bound, and has a right, to make delivery accordingly (citing cases).

What begins in special agreement may, ere long, end in a prevailing custom, either in general trade or in a particular traffic; and THE QUESTION IN ANY PARTICULAR CASE MUST BE, WHETHER THE PRACTICE OF LANDING AT SUCH PARTS OF THE PORT HAS BECOME SO GENERAL AND SO ESTABLISHED AS TO BE FAIRLY AND REASONABLY ENTITLED TO BE RECOGNIZED AS WITHIN THOSE LIMITS WHEREIN THE MERCHANTS OF THE PORT ORDINARILY RECEIVE, AND VESSELS ORDINARILY DISCHARGE, SUCH GOODS. * * *

Tested by the rules laid down by Judge Brown in the *Devato case* it seems to us clear that Westwego was not within the port of New Orleans commercially considered.

In the Devato case a controversy as to the right to make delivery in Brooklyn had existed for some thirty years.

In the case at bar, however, no controversy had as yet arisen, because, and this is significant, only "export cotton" was taken to Westwego, a fact that the shippers, who were away from New Orleans, were never aware of, and therefore raised no controversy over, whereas if defendant had undertaken to deliver other cotton or other goods at that point, such delivery would have been refused and a controversy would quickly have arisen (see testimony of Woods, Fallon, Westfeldt and Harris). Again in the Devato case for almost *five years* previous to that case "almost all the vessels from Colombo and Ceylon have discharged in Brooklyn," whereas in the case at bar deliveries of this one class of goods had been made at Westwego for only a few months, one cotton season. Nor was Westwego within the legal limits of the port of New Orleans. The merchants of New Orleans were not accustomed to receive or deliver at Westwego cargo consigned to the port of New Orleans, indeed

their testimony goes further and shows that they would not do so.

In the case at bar no pretense is made of crowding in New Orleans or that it was inconvenient for any one, but defendant, to deliver or receive cotton there. The greater economy resulting from the holding of cotton at Westwego inured solely to the benefit of the defendant, for *it is not shown that the rate of freight for cotton carried via Westwego was less than that of cotton carried to New Orleans.* Nor can it be said, in the face of the evidence, that greater dispatch was afforded to cotton at Westwego (where it must, of necessity, be held to await a sufficient accumulation to enable it to be sent forward) than at New Orleans, where defendant could by the express terms of clause 12 of the bill of lading carry it to the steamship pier and there deliver it forthwith and compel the steamship to receive it.

Nor is it sufficient for defendant to say that at the time of this fire there were more than enough bales on hand at Westwego to procure the sending of a ship to take them. It cannot show that if a vessel had been sent there it would not have been filled before this cotton was taken aboard, in which case, as was expressly said by LeBlanc, agent of the Harrison line, if a balance of less than 500 bales were left defendant would have to carry them to New Orleans (p. 52).

Contrary to the fact in the Devato case, if this Westwego dock had been suddenly destroyed, as it actually was, no one in the cotton trade would be affected save defendant. It could still carry its cotton to New Orleans, as it had theretofore done and there deliver it to the steamships.

The whole evidence in the case at bar falls far short of that in the Devato case and does not show that the practice of shipping cotton from Westwego had become "so general and so established as to be fairly and reasonably entitled to be recognized as within" the limits of the port.

It was contended by defendant, in the courts below, that the point of delivery from one carrier to another was of no consequence to the plaintiffs, and that the words "port of New Orleans," as used in the bill of lading, referred solely to the port from which the ship cleared. This contention, however, is unreasonable. The bill of lading specified the route over which this cotton was to be carried and the place at which the transfer from the land to the ocean carrier was to be made, and these shippers had a right to insist upon the following of that route.

As was said in *Bazin* v. *S. S. Co.*, 3 *Wall., Jr.*, 229, at p. 238:

> "Reason or no reason he [the shipper] had a right to have his contract fulfilled according to its stipulations."

If "the port of New Orleans" did not include Westwego, as we contend, defendant had no more right to take this cotton there for delivery to the steamship than it had to carry it fifty or one hundred miles up or down the river and there deliver it. As well might the defendant claim that the cotton need not be taken to the port of New Orleans at all, and that so long as the ship cleared from that port the cotton might be carried to Port Eads for delivery.

In *Graff vs. Blumer*, 9 *Pa. St.*, 114, defendants *as carriers* in April, 1845, received goods in New York directed to Galena, Illinois, to be delivered in *Pittsburg* to a connecting carrier. When the goods arrived at Allegheny they were deposited in a warehouse there, temporarily occupied by the defendant while the new acqueduct across the river to Pittsburg was being built, and were there destroyed by fire, there having been no opportunity for shipping the goods down the river after their arrival. *The defendant and all other companies concerned in this trade had occupied warehouses in Allegheny since the preceeding September, and during this period the warehouse in Pittsburg was disused.*

The Court, Bell, *J.*, said:

"It is settled that if a carrier stipulates to deliver articles at a particular town or warehouse and does so deliver them, he is exonerated from subsequent loss, though they never come to the possession of the consignee or owner * * * (citing Garside *v.* Trent and Mersey Nav. Co., 4 T. R., 581 Rep., and Ackley *v.* Kellogg, 8 Cowen, 223). In order to bring themselves within the saving efficacy of this rule, the defendants insist that *though not literally, they substantially fulfilled the engagement* by the delivery at the warehouse in Allegheny, a place in the immediate vicinity of the warehouse in Pittsburg, and in fulfillment of their contract to be consider as parcel of the latter city, being generally so considered and treated by persons residing at a distance. * * *

But there is no proof that the plaintiff knew anything connected with the subject *other than was disclosed by the contract itself*, and the ready answer to the defendant's position is that they undertook to deliver at Pittsburg, and not at Allegheny. It has been repeatedly ruled that *delivery at a point or place in close proximity with the place stipulated will not relieve the carrier from his responsibility as such, mere propinquity of delivery is no delivery.* * * * (Citing cases).

* * * *How can we tell whether the plaintiffs would have agreed to a delivery of their goods in a warehouse in Allegheny City? There might have existed many reasons to deter them and a decision binding them to it would be not to vindicate the contract entered into, but to make a new one;* it is certain the defendants knew they were not in actual occupancy of their Pittsburg warehouse when they made this agreement. If, from this, or any other cause it was inconvenient or improper to deposit goods there, they should not have so undertaken, but having done so they assumed every risk attendant upon their noncompliance, and it is not for us upon the strained notion that distant places may from their nearness be regarded as one, to take from the plaintiffs the advantage the

> law affords them. Their reply to the defendanss that Allegheny is not Pittsburg is unanswerable and fixes them for the value of the goods spoiled. * * *
>
> The question is not of delay of delivery —*it is a question of destruction in transitu before delivery* made, for which no legal excuse is tendered,"

In *Isaacson* v. *Williams*, 26 *F. R.*, 642, the Court well said:

> "If a usage is general, both parties are presumed to know it and to contract in reference to it. If it is special and confined to a particular port only there is no such presumption."

and, again, in *The Innocenta*, *Fed. Cas. No.* 7050:

> "To make a custom of the port, the rule must be so generally known and acknowledged and acted upon, as virtually to be applied by the whole of that part of the business community which it would affect."

In *Hostetter* vs. *Park*, 137 *U. S.*, 30, a case which seems to be relied upon by the defendant herein, it is said:

> "A deviation is defined to be a voluntary departure without necessity or reasonable cause from the regular and usual course of a voyage in reference to the terms of a policy of reinsurance, but it is no deviation in respect to such a voyage to touch and stay at a port, if such departure is within the usage of the trade."

The same doctrine is applicable in the case of a bill of lading, even though the usage be not known to the shipper, and

> "It is well settled that parties who contract on a subject matter concerning which no usages prevail, incorporate such usages by implication into their agreements if nothing is said to the contrary."
>
> *Hostetter* vs. *Park* (*supra*).

But in that case the usage was found to be the general usage in the Pittsburgh and New Orleans barge trade, *coeval with the commencement of the business and constantly practiced* where cargo is to be taken *en route* to the port of destination at several points in the same neighborhood, &c.

If it had been a general usage for steamers loading at New Orleans to go to Westwego, that case would be an authority, but as nothing of the kind appears in the case at bar, and as this alleged usage or custom was of only one season's existence, and there is no pretense that it was a general or long established usage, the *Hostetter* case is not in any respect an authority adverse to any position contended for by the plaintiff.

The merchants did not recognize Westwego as in the port. Their testimony is clear. No one of them considered Westwego as commercially within the port. Yet they were on the ground. They knew Westwego and its relation to the port; they were all merchants of New Orleans of long experience in business there and were familiar with the port. The steamship agents, who were the only ones who ever went there, did not recognize it as in the port, and would not go there, except for a certain quantity of freight, and this fact defendant recognized. As was said by Mr. Hammond:

> "It was always tacitly understood that I would not go there for less than one thousand bales, *and they never demanded that I should*" (p. 56).

In *Young* v. 14,000 *Hard Bricks*, 98 F. R., 149, it is said:

> "Every custom, in order to become obligatory, whether local or general, must be so well known and understood that it may fairly be presumed, that all persons engaged in that trade are acquainted with it and assent to it. To be obligatory it must not be merely a loose practice, but precise, definite and certain, so as

> to supply the place of the common law in the given case and be capable of being applied to the contract in defining and fixing the rights of the parties under it."

There is no proof from which the inference could be drawn that these plaintiffs were acquainted with defendant's peculiar system of dividing its cotton between Westwego and New Orleans; or that they assented to it. Not one witness would acknowledge that he considered Westwego as commercially within the port.

All the ship agents state that by the custom of the port of New Orleans, as it existed in November, 1894, a shipment of 100 bales of cotton would have to be carried to the city front in New Orleans before they would accept a delivery of it.

The shipment in this case was of only 100 bales, and the contract was made with reference solely to that number.

It is unreasonable to suppose, without a syllable of evidence to support it, that these shippers understood, when receiving this bill of lading, that their cotton would be carried to Westwego, a comparatively new and unknown point of delivery, to be there held, solely for defendant's benefit, until it should accumulate enough cotton at that point to procure the sending of a ship to take delivery there.

The contention of the plaintiffs does not call for an unreasonable construction of the word "port" as used in this bill of lading, but they insist that it is reasonable and just to hold that, as used here, the word did mean

> "those limits wherein the merchants of the port ordinarily receive and vessels ordinarily discharge such goods."
>
> *Derala case, supra.*

The defendant knew when the shipment was received that it intended to take this cotton to Westwego; it likewise knew that it must be

held there till a sufficient accumulation was on hand to enable it to procure the sending of a vessel to which delivery thereof could be made. Yet not one word of this was spoken to the shipper. His cotton was received marked to be transported "to the port of New Orleans." It never reached "the port of New Orleans," because defendant deviated, not only from the language, but from the spirit of its contract, and such deviation was material in that it caused the absolute loss of the cotton. We therefore submit that, for that loss, the defendant should be held liable.

(*C.*) Irrespective of the geographical position of Westwego and of the question whether *any* delivery there was a proper one, we submit that this cotton was not treated by the defendant in accordance with the custom and usage of the port of New Orleans.

These carriers had secretly, behind the back of the shippers, arranged that this cotton could be shipped on a steamship at any time in three months, from October 24 (p. 176), and that there was no obligation on the Steamship Company to take it at Westwego at any time within such three months until two thousand bales had accumulated.

There can be no pretense that the evidence shows that such a new and unusual course of business coincided with any custom of the port. It was conclusively shown to be in the very teeth of the custom (p. 109) But if such departures from the ordinary, usual method of handling cotton, taken without the slightest knowledge on the part of the plaintiffs, were not clearly such deviations from the usual methods of transportation as to take from the carrier the benefit of any exemption contained in the bill of lading in his favor, certainly the burden of proof was upon the defendant to show that they were not.

The Bill of Lading, clause 11 (p. 172), contemplates that the cotton should go forward on the first steamer leaving New Orleans after the arrival of the cotton there.

Had this cotton been taken even to New Orleans instead of to Westwego, and there held for three months for the ship's convenience and until 2,000 bales were accumulated, it surely could not be pretended that this would have been within the custom of the trade.

Third Point.

The judgment appealed from should be reversed.

FREDERIC E. MYGATT,
GEORGE RICHARDS,
TREADWELL CLEVELAND,
Of Counsel.

Supreme Court of the United States.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER and PAUL LEON ROEDER,

Plaintiffs in Error,

AGAINST

THE TEXAS AND PACIFIC RAIWAY COMPANY,

Defendant in Error.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

Statement.

A detailed statement of facts is not deemed necessary here, the Court being familiar generally with the subject matter of the series of actions of which this is one (Clayton vs. Texas & Pacific R. Co., 84 Fed., 305, 173 U. S., 348; Reiss vs. Same, 98 Fed., 534; Callender vs. Same, 98 Fed., 538). In this case the bill of lading in terms exempted the carrier from liability for loss or damage by fire (Record, p. 170). Considerable testimony was produced by the plaintiffs, the object of which was to establish negligence of the defendant, causing the loss. This testimony will

be discussed fully later and need not be set forth at this time. The trial Court at the close of plaintiffs case, directed the Jury to return a verdict in favor of the defendant. This action of the trial Court was affirmed by the Circuit Court of Appeals (102 Fed. Rep., 246).

The 65 bales of cotton involved in this suit arrived in Westwego on November 7th, 1894, and were never taken out of the cars. No transfer sheets or notice of arrival had been sent to the steamship company (Record, p. 30). The fire occurred on the evening of November 12th, 1894. The bill of lading covering the cotton contained a clause exempting the carrier from liability for any loss or damage by fire from any cause or wheresoever occurring, but it is claimed that defendant is not entitled to the benefit of this exemption, first, because of an alleged deviation, and second, on the ground of negligence.

FIRST POINT.

There is no force in the plaintiff's contention that the carriage of the cotton in suit to Westwego constituted a deviation whereby defendant lost the benefit of any exemption in its favor contained in the bill of lading.

This point, raised but not passed upon in the Clayton case, urged again in the Reiss case, and there decided in defendant's favor by the Circuit Court of

Appeals (98 Fed. R., 534), was again strenuously pressed in this case in the lower courts by plaintiff's counsel, and with no apparent justification. In the brief filed in the Circuit Court of Appeals it was claimed that there was in this record "additional proof" not contained in the record in the Reiss case.

The so-called "additional proof" disclosed by the record is merely that at the time of the fire the defendant had a large amount of cotton on hand at New Orleans, as well as at Westwego. In their brief in the Court of Appeals counsel quoted from the testimony of Mr. Harris, agent of the Cromwell Line, to the effect that that line received thousands of bales of cotton from the Texas and Pacific Railroad Company at its dock in the City of New Orleans, some of which was destined for Europe. On this fact they argued that the defendant

> "was carrying more cotton to New Orleans than it did "to Westwego, and was during all that time continu- "ally forwarding cotton by steamships from New "Orleans."

This was urged by them as a ground for overturning the decision of the Court in the Reiss case that Westwego was,

> "so far as export cotton is concerned, that port [New "Orleans] in the well-understood commercial and busi- "ness sense, and was the part of the port of New Or- "leans where steamship companies rightfully expected "to receive cotton from Texas for transportation to "Europe" (98 Fed., 538).

The difficulty with this contention is that the plaintiffs failed to show that the cotton handled in New Orleans was of the same class as that handled at Westwego, *i. e.*, export cotton shipped under a through bill

of lading from some point in Texas to a foreign port via the Texas & Pacific Railroad Company (or a connecting line) and a line of steamships running *from New Orleans to a foreign port.* Plaintiff's counsel quoted from the testimony of Mr. Harris, but entirely omitted to set forth two important features: First, that his line of steamships runs only from New Orleans to New York (New York being the other terminus of the line); and, second, that the "through rate," as to which he testified, was from the point of shipment to the New England Mills (Record, p. 34). He expressly said (Record, p. 35) that he knew nothing about foreign export cotton. The fact, therefore, that his coasting steamers, which ran no farther than New York, took their cotton at their docks in the City of New Orleans instead of at Westwego, is of no significance. It in no way affects the force of the abundant evidence elsewhere in the record, establishing the existence of the custom in respect of foreign export cotton.

In the brief filed in the Reiss case in this court, we have presented the authorities bearing upon this question, and will not repeat what we have said there. A few additional considerations may be pertinent.

First. The rule invoked by the plaintiff, that a carrier is liable in the case of deviation, is applicable only when such deviation has been from the material terms of the contract. That is not the situation here.

(a) New Orleans was not the destination of the cargo. Nothing was to be done with the cotton there except transfer it from the cars to the steamship for further transportation. At what precise point in the harbor this was done was a matter of no

consequence to either shipper or consignee. The words "port of New Orleans" were of no significance except as indicating the point of departure of the vessels of the designated steamship line. So long as the cotton was placed on one of the Elder-Dempster Line ships clearing from the port of New Orleans, the material requirements of the contract were fulfilled, although the physical transfer of the cotton from the cars to the ship had been made at a point not within the boundaries of the legally created port. As used in this bill of lading, therefore, the words "port of New Orleans" have no narrow or restricted meaning, but were simply to describe in general terms the point of transshipment. As was said by LUSH, J., in *Harrower vs. Hutchinson*, 38 L. J. (Q. B.), 185, they

"must be read in a liberal sense, not merely as meaning those places which are technically and properly known as ports, but all places where ships are accustomed to resort for the purpose of taking in cargo."

See, also similar language in Sailing Ship Garston Company against Hickie, 15 Q. B. Div., 580.

(b) The argument was advanced in the Courts below that it was intended by the shipper that he should have the benefit of such special protection from fire as would be afforded to him by the New Orleans Fire and Police Department, but this is fallacious. It cannot be assumed that the legal limits of the port of New Orleans are coterminous with the City of New Orleans proper, or those parts of it which have the benefit of police and fire protection. Doubtless there are many points within the technical construction of the bill of lading contended for by the plaintiffs that are quite as remote as Westwego from the thickly set-

tled portions of the City. Had the theory now advanced been correct the shipper would have insisted on a bill of lading providing for transshipment, not in the "port of New Orleans," but in the City of New Orleans, or at some particular pier or warehouse in that city.

SECOND. Even if the deviation could be regarded as material it would not affect the defendant's rights in this case, because the testimony shows that it was the general and established usage of the port for steamships to take delivery of export cotton coming by the Texas and Pacific Railroad at Westwego.

(1) The plaintiff's contention, as stated in the brief filed in the Court of Appeals, is

"that the carrying of cotton to Westwego by defendant alone, out of the many competing lines of railroad centering in New Orleans, * * * was not a carriage in accordance with the terms of a bill of lading calling for transportation to the port of New Orleans, and did not operate to change the custom which had theretofore been universal and by virtue of which all cotton directed to be carried to the port of New Orleans was carried to New Orleans and delivery thereof made at the City Front."

The difficulty with this contention is that it is entirely at variance with the evidence, the fact being that it was the universal custom among foreign steamship lines in New Orleans to take delivery of cotton from the various railroad companies having termini in New Orleans at points remote from the City Front. The Court will notice, from an examination of plaintiff's Exhibit F, the map printed at page 178 of the Record, the location of some of these terminals. Southport, for example, is located about a mile above the city

limits of New Orleans, and in another parish, on a branch of the Illinois Central Road (Herzog, Record, p. 111). At this point are located the Stuyvesant docks, owned by the Illinois Central Company (Hammond, Record, p. 60). Algiers, which is on the same side of the river as Westwego, some distance further down the stream, is a terminus of the Southern Pacific Railway Company (Boylan, Record, p. 118). Gretna (not named on the map) is also on the same side of the river as Westwego and about three miles further down the stream (Record, p. 13).

Mr. LeBlanc said (Record, pp. 49, 50):

"We used to make engagements for cotton, and "when it came in we went there for it, but we had no "special arrangement—just like anybody else. We "went to Westwego for it, and everybody did; there "was no special arrangement. * * * When I said "that our ships received cotton everywhere before "1894 and 1893, *I meant that they went to various "points to receive cotton. I should think that the bulk "of the cotton carried by the Harrison Line was received "at other points than their own wharf. That custom "was universal with steamships landing here in New "Orleans.* That is, at the terminals of railways the "steamship lines were all accustomed to receive cotton "which was shipped over the various rail lines which "was to go from the rail lines to the steamship "lines. * * *

"Q. It was the understanding, was it not, that in "these written contracts for through rates Westwego "was the place of reception by the steamship company "of the cotton? A. Yes, sir.

"Q. And that had been so for some years prior "to 1894, hadn't it? A. I think so.

"Q. This wharf at Westwego is not the only wharf "of the kind where similar shipments are made, is it? "A. No. There were not many others. There were "only two others. And there were in 1894, *they were "at Southport and Gretna.* Gretna is opposite New "Orleans on the west bank of the river, the same side "as Westwego. A little further down near the city. "And Southport is higher up and on the east side.

" On the same side as the City of New Orleans. *The* " *same method of handling and receiving cotton was ob-* " *served there.*"

Mr. Hammond said (Record, p. 54) :

" I have one wharf at the foot of St. Mary's Street, " in the City of New Orleans, but I load many of my " steamers at the different terminals as well."

Speaking of deliveries at Westwego, he says again (at p. 60) :

" Q. The same arrangement obtains for cotton at " Southport ? A. At Southport, the Stuyvesant Docks " and Chalmette."

Mr. Sanders says (Record, p. 67) :

" Q. Prior to the erection of the dock at Westwego, " which was destroyed in November, 1894, where was " cotton delivered to your line for transportation ? A. " Well, *we had cotton delivered to us at the different* " *railway terminals and at our own wharf.*

" Q. Where were the terminals at which cotton was " delivered to you ? A. There was the Illinois Central " terminal at Southport. I think at that time we used " the Southern Pacific at Gretna, and I suppose the " Texas and Pacific at Westwego also."

That the same practice was pursued by other steamship companies is evident from the allusions in the testimony of other witnesses called by the plaintiff, who spoke less fully on the subject.

Mr. Fornaris said (Record, p. 33) :

" I would not send the ship anywhere for ten bales " of cotton ; there had to be a sufficient amount of cot- " ton to justify me in sending for it. That was true at " Westwego, Southport, on this side, Algiers, or any- " where."

And Mr. Warriner, Agent of the Elder-Dempster Line, said (Record, p. 41) :

" We have taken less than 2,000 bales at Westwego, " certainly. It might suit us sometimes to take less. " *If we were at Southport* we might drop over to West- " wego and take whatever they had and we did that, I " think, in several instances."

From the foregoing it appears conclusively that the custom of the port was for steamship companies to take deliveries of cotton at the terminals of the different railways, irrespective of whether or not they were within the city limits. Whether or not Southport, Gretna or Algiers were within the legal limits of the port does not appear from the record, but it is evident from an inspection of the map that they are practically as remote as is Westwego from the heart of the City of New Orleans.

(2) The fact that it was not the custom of the steamship companies to go to Westwego or other terminals similarly located, excepting for a certain amount of cotton, does not affect the question of the existence of a general custom or usage regulating shipments under a through bill of lading like the one in suit.

(a) It must, as a rule, have been the case that there was a sufficient amount of cotton ready to satisfy the requirements of the steamship companies, for the evidence is clear that practically all export cotton on through bills of lading by the T. & P. road was taken on board the steamers at Westwego, and only shipments for local points or cotton shipped for foreign ports, on other than through bills of lading, were delivered in New Orleans proper.

Mr. Le Blanc said (p. 51) that he could not remember any through shipments of cotton in 1894 where it was delivered at his dock in the City. Whatever shipments were made from his two wharves in

New Orleans "were smaller amounts from smaller "roads for spot shippers and for individual shippers."

Mr. Sanders said (p. 70):

"But I think that after the erection of the wharf at "Westwego all cotton was loaded there, that is, all ex- "port cotton, so far as our lines were concerned.

"Q. That is, the delivery of export cotton in the "City of New Orleans, along the Front, had about "practically ceased? A. Yes, sir."

Mr. Ross testified (pp. 62, 63) to the same effect.

(b) In addition to this general evidence there is the particular fact appearing in this case that at this time there was an accumulation of cotton on the Westwego docks largely in excess of the capacity of the steamship lines to remove. There is, therefore, no force in plaintiff's suggestion that because the shipment in the present suit was only one hundred bales it could not properly be delivered at Westwego. No such narrow view is admissible under the conceded facts. The particular engagement of cotton, of which this shipment was a part, under contract No. 73, was for 2,500 bales (pp. 176, 177), and it appears from the Cotton Reports for several days preceding the fire that there was much more than this amount of cotton destined for Havre by the Elder-Dempster Company Line at Westwego (Record, pp. 179–187).

Under these circumstances the precise situation described by the shipping agents was presented, namely: That they would always go to Westwego to take export cotton, provided the shipment was of a sufficiently large quantity to comply with their understanding with the Railroad Company.

(c) The fact that this general usage of the port may not have been known to the shipper (which, by the

way, does not appear in this case) does not affect the question of the defendant's right to make such a delivery.

In Hostetter vs. Park, 137 U. S., 30, certain merchandise was shipped from Pittsburgh on board a barge, to be transported from Pittsburgh to New Orleans, and "to be delivered without delay in like good order at the port of New Orleans, Louisiana [the dangers of fire and unavoidable accidents excepted]." It appeared that when the tug having the barge in charge in question, and other barges, in tow, had arrived safely at Mount Vernon, Indiana, and taken on board additional cargo, it left all of the other barges and went back up the Ohio River several miles with the barge in question, taking on additional cargo. Upon the return down the river an accident occurred causing the loss of the cargo. The plaintiffs contended that this was a deviation, while the defendants claimed that it was a well-known custom for the owners of vessels to land their fleet at various points along the river, and there make a contract with shippers for the transportation of goods, and then detach from the fleet the barge or barges designated to receive such cargo, if it was not there, and send the barge or barges so designated to the place where the cargo might be stored, whether up, down or across the river.

The Supreme Court held, BLATCHFORD, J., writing the opinion, that it was no deviation from the regular and usual course of the voyage to touch and stay at a port out of the course if such departure was within the usage of the trade, and said "the same doctrine is applicable in the case of the bill of lading, even though the usage be not known to the particular shipper if it be established as a general usage."

There is much less ground in the case at bar to claim a legal deviation than there was in the case of Constable vs. Steamship Co., 154 U. S., 51. See upon this question the opinion in that case, (pp. 63 and 66 and cases cited). The Supreme Court, however, completely disallowed the claim in that case.

SECOND POINT.

No error was committed in excluding evidence as to the situation of affairs at Westwego prior to the erection of the dock at that place.

The testimony was uniformly to the effect that, after the construction of the dock, Westwego was a point for the reception and delivery of Texas and Pacific cotton shipped on through bills of lading, and that for that purpose it had superseded almost entirely the delivery of cotton at the various steamship companies' docks in New Orleans. In view of that testimony, what was done prior to the erection of the dock at Westwego was wholly immaterial. Also, it was wholly immaterial where cotton had formerly been delivered for transportation by the Texas and Pacific Railway Company to a particular line or lines of steamships. A clear, recognized place of delivery had come to be accepted by all the steamship companies under these T. & P. contracts, which was Westwego, and the mere fact that it had only been two years since the construction of the dock in no way prevented the general recognition of Westwego as the place of ship-

1422

ment. It had in the particular traffic come to be a prevailing custom.

Moreover, the excluded evidence was also objectionable as being cumulative, for it already abundantly appeared in the case that it was not until the dock was constructed that Westwego was used as a place of delivery.

It was also immaterial as to whether or not the party interrogated considered Westwego commercially within the port of New Orleans. The testimony excluded was open to the objection that it did not ask for a fact, but an opinion of the witness—it did not tend to establish a custom, but an opinion of the witness as to what the effect of custom or absence of custom established. Custom is a fact to be proved like any other fact. It cannot be proved by asking a witness his opinion of the existence or non-existence of the fact. The question asked of the witness Fallon did not ask for the fact, but for the witness' opinion. This was clearly improper.

THIRD POINT.

The Court did not err in taking the case from the jury and directing a verdict for the defendant in error.

A great amount of testimony was taken by the plaintiff to the effect that during the time the cotton was located on the wharf at Westwego and immediately prior to the time of the fire at Westwego, there were

serious labor troubles between the white and colored steamship labor in the city of New Orleans.

The testimony also showed that serious fires had occurred in New Orleans. The testimony was limited to steamship labor and related wholly to controversies primarily between white and colored laborers employed in loading vessels, but which had in its development included the owners of some of the vessel lines. None of this testimony, however, in any way related to the situation of affairs at Westwego, nor did the railway company in any way have any connection with the steamship labor. It employed none, and there were no labor troubles of any kind and no threatenings of incendiarism at Westwego.

With respect to these labor troubles, there was absolutely nothing in the testimony at any point upon this record in the slightest degree tending to connect them with the fire which occurred in the wharf at Westwego on the night of November 12, 1894.

The second point upon which testimony was offered tending to show negligence was as to the fire apparatus at Westwego. It was shown that the wharf was supplied with a certain number of hydrants at each of which was a line of hose and hose pipe and also supplied with barrels and chemical fire apparatus ; but there is nothing in the record to show that the wharf was not suitably provided with appliances fit for extinguishing fires. On the contrary the plaintiff's own testimony shows that it was supplied with hydrants in each shed, to which were attached hose all ready for use attached to a water tank with a sufficient pressure to throw the water, and also that there were a large number of barrels, which were kept filled with water.

In the former brief of plaintiff's charge is made against the mode of keeping the hose in these words :

"The testimony shows that this hose was piled back and forth on a shelf built around a post in the shed. It also shows that the customary way of keeping hose was to keep it stretched out so the nozzle would be easily accessible."

There was no citation of testimony to support this statement. The only testimony upon the subject is that upon the direct examination of James P. McArdle at page 135, as follows :

Q. How was it stretched, Captain? A. Stretched, if I remember right—now I think they had a baton nailed on the post; that is, the one towards the front—and the hose was stretched there from post to post.
Q. Well, was that the proper way to have it done? A. It was the usual custom, yes, sir.
Q. That is the usual way to have it done? A. Yes, sir.
Q. In that way—stretched along? A. Yes, sir.
Q. So, that when the water was turned on, the nozzle would be easily accessible. Is that what you mean? A. Yes, sir.

The testimony of L. Herzog regarding the fire apparatus used by the Illinois Central Co. at Southport was :

We had our hose rolled up at that time on reels. It was fed from a tank. The tank was about 150 or 200 feet from the wharf.

Also he describes a connection of hose with the standpipes, with a hundred feet to each standpipe, precisely the same length of hose which the defendant had attached to its standpipe at Westwego.

In the third place, testimony was offered as to some changes in the number of watchmen employed about this wharf during the month of November; that on the Sunday next previous to the fire there had been some

increase in the number of watchmen, and then a diminution to a fixed number which remained constant during the succeeding week. The testimony is that a certain number of these watchmen were constantly on duty day and night, and there is nothing to show that they were not efficiently discharging their duties at the time of the fire.

Fourth, there was testimony offered that a locomotive had come upon the wharf at 11 o'clock in the forenoon of the day of the fire; that the fire occurred at 6:10 or 6:15 in the evening of November 12th. The claim was made in the brief of plaintiff in error in the Court of Appeals that the wind was blowing from the direction where this engine was towards the place where the fire was discovered; that during the day the wind was blowing from the track toward the centre of the dock and that a spark from that engine might easily have been blown into the shed some time before the fire and smoldered there. The testimony shows that no such thing could have happened. This fire broke out in the upper part of Shed No. 2 and the witness Kerkam, the United States weather observer, shows the direction of the wind all day (p. 119). The testimony of the various witnesses as to the position of the engine—to wit, Ellis, Nie, Lincoln, Reinhard and Stytch, showed that this engine was on the south end of the wharf opposite Hatch No. 3, which the witnesses placed at about the lower end of Cotton Shed No. 1. Kerkam's testimony shows that the wind was blowing from the east or northeast all day. The map plaintiff's Exhibit F shows that the wharf stood nearly north and south. It was therefore impossible for a spark to have drifted from the locomotive from the position in which it is described by the witnesses

against the prevailing wind, almost directly northeast and underneath the shed and into its centre where the fire actually originated. Besides this, there is no testimony that this engine was throwing sparks, or that there was any danger from its location and presence upon the wharf. The testimony of the witnesses that it was frequently there would create the contrary presumption, and that it was not an improper or unusual thing.

With respect to all the foregoing contentions it is a sufficient answer to the argument of the plaintiff in error that not one of them is shown in any way to have been connected or to have had anything to do with the production of the fire and, therefore, they may be laid out of question.

The opinion of WALLACE, J., in the Circuit Court of Appeals, very concisely states the effect of all this evidence as follows:

"As to the second ground of recovery, the case as to the first issue hardly merits discussion. That there were evil disposed persons in the vicinity who might have set fire to the cotton, and that the defendant by keeping a larger force of watchmen at its wharf might have more efficiently protected its property from risk, are facts that may be assumed to be proved by the evidence. But these facts did not prove or tend to prove that the fire was actually the work of an incendiary, and there was not a scintilla of evidence to prove this. On the other hand the place where it was shown the fire started raised a persuasive inference against the theory of an incendiary origin, because it started at the most unlikely and dangerous place for the operations of an incendiary. There was not a particle of evidence to connect the locomotive with the fire. If the fire had started in the cotton which was stored in the vicinity of the locomotive, there would have been one fact of value; but it did not. It does not appear that the locomotive emitted any sparks or dropped any coals. No fact was elicited

to prove that the locomotive engendered risk beyond its mere presence; and seven or eight hours had elapsed after the locomotive was taken away. The case for the plaintiffs as to the negligent origin of the fire rested wholly upon conjecture and speculation."

Upon the trial of the present case, after all the other testimony had been introduced bearing upon labor troubles, presence of the locomotive, crowding of cotton upon the wharf, etc., a witness, Robeau, was called, and the further question is whether upon his testimony there was sufficient evidence of negligence to send this case to the jury.

The contention of the defendant in error is that there was not.

Robeau was a watchman employed by the Boylan Detective Agency, and had been engaged at Westwego prior to the 12th of November for a period of about eighteen days. He was a night watchman, and went on duty at about 6 o'clock in the evening. With him on duty, on the evening of the fire, were other Boylan men, Peake, Schoen, and a watchman in the employ of the Texas and Pacific Railway Company named Valle. Schoen's location was underneath the wharf. Peake's location was in Shed No. 1. Robeau's location was in Shed No. 2, where the fire occurred, and not far from him at the time of the outbreak of the fire, was Valle. On the night of the fire, after Robeau had gone at 6 o'clock to the office of the railway company in the lower end of Shed No 1, and had telephoned to the Boylan office, and had attended to the preliminary work of arranging his lamp and getting the keys for the watchman's clock, and had made the round, as he says, of the dock, he was standing near the lower end of Shed No. 2. He saw the railway

watchman, Valle, pass. In a minute or two, as he says, he heard the crying of "Fire! Fire!" He ran to the woodside of the wharf through one of the gangways and then to the river side, and, as he describes it, in about half a minute he reached the point where the fire had broken out and found Valle with the hose in his hands upon a pile of cotton. In order to reproduce exactly his testimony, it is but fair that we present it in his own words (Direct Ex. p. 153):

"I saw Valle with the hose in his hand, and he says, 'Go down and open the valve.'

"By Mr. Cleveland:

"Q. What did you do? A. I went to open the valve. I could only go sideways. I couldn't hardly stand; and I found the valve wide open. Then I came back and tried to help Mr. Valle with the hose in his hand. Everything was in flames. I couldn't do anything. I tried all my might to have the water, but we could not have any water. The hose was too heavy; we couldn't do anything at all; and he says to me, 'Robeau, go down and untangle the hose,' I says, 'I won't go down where the flame is.' I kept up; that is the only thing I could do. I went to the other end of my beat and took my coat and ran away. * * *

"Q. When you first saw Valle, what was he doing? A. He had the hose in his hand.

"Q. What was he doing with it? A. He couldn't do nothing. When I went down there he told me to go down and open the valve; and so I went and it was wide open.

"Q. When you were down there trying this faucet, and found that it was wide open, did you see any water coming out? A. No, not a drop. We could not have any water.

"Q. You did not see any water when you were opening the valve? A. Yes, I saw the pouring.

"Q. Leaking, you mean? A. Yes.

"Q. When you clambered up with Valle and he had the hose in his hand, what part of the hose did he have in his hand? A. The pipe.

"Q. Was there any water coming out? A. No, sir."

He says further that Valle was trying to have water, but that he could not have any ; that the hose was pretty near where the fire was, against the post ; that it was on the floor of the platform ; that the hose was about six feet high ; and that he tried to pull out the hose to have water to extinguish the flames, but could not because everything was in flames. He says he thinks that about three or four bales of cotton were on fire ; that he was, maybe, two or three seconds trying to untangle the hose ; he says he did not see any barrels of water near that place nor any buckets nor fire extinguishers.

On cross-examination, he says that at most of the posts there was a barrel, and these barrels were filled with water, and that it was a part of his business to look and he did look to see if they were filled, and if they were not filled, he filled them himself. He says on the woodside there were barrels ; there were also buckets. He further says :

" ' I went to the woods again. I went through the gangway and I saw Valle.'

" Q. This hose he had in his hand, you say, do you ? A. He had what ?

" Q. He had the hose pipe in his hand, did he ? A. Yes, he had the pipe in his hand.

" Q. How far was the hydrant from where he was ? A. About 10 feet, but where he was he could not see the hydrant.

" Q. He could not see the hydrant ? A. He was on top of the cotton. He could not see me when I went down neither.

" Q. What did you do when you went there ? A. I went there and saw the valve was wide open.

" Q. The what ? A. The valve of the pipe.

" Q. And was there water in the hose ? A. Kind of water ; yes, in the hose.

" Q. It had pushed out in the hose, had it ? A. Yes, swelled up.

"Q. How far had it pushed out and swelled up in the hose? A. I didn't look. As soon as I saw it open I went to Valle to help him.

"Q. What did you do to help him? A. We tried to pull the hose free, and we couldn't do anything.

"Q. The pressure of the water had kinked the hose? A. Yes, the hose was so tangled that we could not do anything. At the same time the blaze was going on; and Valle says to me, 'Go down and have it untangled.' And I said, 'No, I won't go, go yourself if you want to.'

"Q. And you run away then, did you. A. Yes, I did. I tried to save my skin.

"Q. This cotton was blazing? A. Yes, very high.

"Q. Blazing right up? A. Yes.

"Q. Blazing way up? A. Yes.

"Q. How high was it blazing when you got there? A. About six feet feet from the floor—about.

"Q. How high was the pile of cotton? A. The cotton was piled about 15 feet high.

"Q. Was it blazing along the side of that pile of cotton? A. Yes, spread out.

"Q. Spread out along the ends of the bales, was it? A. Yes.

"Q. Where was this kink in the hose—down below Valle? A. Where the platform was?

"Q. Yes. A. About 6 feet under.

"Q. You say the valve when you tried it was wide open? A. Yes, sir.

"Q. How far out in this hose had the water pushed out from the pipe? A. I don't know that.

"Q. Did you take hold of the hose to see? A. With all my might, all the strength I had.

"Q. And the pressure of the water was so heavy that you could not straighten it out? A. We couldn't budge it.

"Q. Do you know who opened that valve? A. I don't know.

"Q. Do you know how high the fire was when that valve was opened? A. Yes.

"Q. How high was it when the valve was opened—when it was first opened?

"THE COURT: He found it open.

"THE WITNESS: I found it open when I got there.

"Q. You don't know who opened it? A. No, I don't know who opened it.

"Q. How long were you there with Valle when you discovered this fire? A. I never took my watch for that. I did the best I could.

"Q. How long were you there? A. May be two or three seconds; I don't know.

"Q. And then where did you go? A, I went up stairs to help him.

"Q. You went up on the cotton? A. On the cotton.

"Q. How long were you there with him? A. May be one or two seconds.

"Q. Then where did you go? A. I said I tried to save myself. * * *

"Q. How long was it before that fire was spread all over No. 2 Shed? A. How long did the fire last?

"O. How long was it before the fire was spread all over No. 2 Shed? A. About 10 minutes."

This is the substance of the testimony of this witness and the question arises whether upon this testimony there was ground to send the case to the jury. The trial court was inclined to the view that, upon this testimony, the case should go the jury, but after considering the case over night, was of the opinion that the plaintiff's case did not present sufficient evidence to take it to the jury. His reasons therefor fully appear in the direction to the jury (Record, pp. 162-165).

The proposition has been strongly urged in the Courts below that in this case the doctrine of *res ipsa loquitur* applies and the cases of Scott vs. London & St. Catherine Dock Co. and Russell vs. Steamboat Company, a New York case, were cited in support of the contention. We conceive however that such rule can not be applied here, and that the law of this case is announced very clearly in the case of Western Transportation Co. v. Downer, 11 Wallace, 129. The rule is there laid down by Justice FIELD at page 134, as follows:

" The presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such character that when due care is taken in its performance no injury ordinarily ensues from it in similar cases or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control and for the management and construction of which he is responsible."

After considering the doctrine of Scott vs. London and St. Catherine Dock Company and some other similar cases he says further (p. 134) :

" It is plain that the grounds stated in these cases, upon which the presumption of negligence arises when an accident has occurred, have no application to the case at bar. The grounding of the propeller and the consequent loss of the coffee may have been consistent with the highest care and skill, or it may have resulted from his negligence and inattention. The accident itself, irrespective of the circumstances, furnishes no ground for any presumption one way or the other. If, therefore, the establishment of the negligence of the defendant was material to the recovery the burden of the proof rested upon the plaintiff."

The doctrine of those cases, we insist, can have no application here, but this case must be tested by well-settled rules established in cases of negligence, and that is that the plaintiff must establish the three essentials to a recovery, to wit, (1) the negligent conduct of the defendant; (2) the loss or damage and (3) a direct causal relation between the negligence and the injury or loss. We may concede that the second of these elements is proven in this case. The cotton was burned. That is admitted in the pleadings. As to all the alleged grounds of negligence recited—to wit, the labor troubles, the locomotive upon the wharf, the insufficiency of watchmen, and the improper placing and management of fire apparatus—

there is no neglect shown by the testimony of plaintiffs in error, and nothing whatever by way of connection, as we have already stated, between the alleged negligence and the injury or loss.

If, therefore, there was any connection between any alleged negligence of the defendant in error and the loss, the connection must be found in the conduct of Valle and Robeau. Was the defendant negligent in respect of what occurred, as testified to by Robeau, at the time of the fire? It has been suggested that Valle was a young and inexperineced watchman. There was nothing in the record to show that he was not fully competent to discharge the duties of a watchman upon the dock at Westwego. He had been so employed for some time with the approval of the Boylan police force, who had had experience in matters of that sort for a long series of years. That he was young in years in no way militates against his fitness for a position of this kind. He was prompt, as the testimony shows, to discover the fire. He very promptly gave notice of the existence of the fire.

The testimony shows uncontradictedly that the defendant had an ample supply of water in its tank connected with the pipes leading under the wharf and to the hose connected therewith. The testimony shows that Valle very promptly, and even before Robeau came to him, was endeavoring to use those appliances to put out the fire which had occurred. The testimony shows that the fire broke out within 10 feet of the connection of the hose with the hydrant or standpipe ; that the hose was 100 feet in length. The claim of the plaintiff is that instead of being laid coiled back and forth upon a platform, as the testimony shows that this 100 foot of hose was, it should have

been stretched its full length along and upon a board or continuous platform, and that the failure to have it so arranged is evidence of negligence. The testimony shows that Valle had opened the valve and that the water was pressing into the hose to such an extent that both Robeau and Valle together were unable to straighten the hose so that the water could come through the pipe which Valle had in his hand.

Let us consider these suggestions a moment:

Suppose the hose had been stretched its full length of 100 feet, and that Valle, when he discovered the fire within 10 feet of the connection of the hose and the hydrant, in order to utilize it had run to the valve and opened that and then had run down to the nozzle and brought the nozzle back to the point of the fire; in view of the testimony of Robeau of the rapid spread of the fire who can tell but that the time thus spent would have allowed the fire to gather such a headway as that it would have been utterly impracticable to put it out with any appliances at hand upon the dock? Or, supposing that before opening the valve he had anticipated that which evidently occurred, that the pressure of water would be so strong that he would be unable to pull the hose apart and straight when the water was thus let into it, he had straightened the hose in advance, and then opened the valve and brought the nozzle to bear upon the fire—who knows, and what sort of a guessing match would be instituted here for the jury to say that by Valle's having taken this course the fire could have been extinguished? In other words, assuming that Valle could have anticipated all that occurred, the argument of the plaintiff is based upon the theory that the defendant is bound to anticipate every possible contingency under which

fires may arise, and upon that contingency to arrange its appliances for that purpose. It is true that a short hose pipe might not have kinked, and been found better adapted to this particular fire. But that being so, is the defendant bound to have only a short hose pipe? or to have the short hose pipe in the immediate vicinity of this particular fire? And if so, and a fire occurs out of the reach of such hose, would it not be responsible for not anticipating that condition also?

The argument of the plaintiffs' assumes too much. It assumes that the defendant railway company is bound as an insurer to anticipate all the possible contingencies under which a fire may occur, and to meet and provide for all such contingencies in advance; and, if it fails so to meet them, that it then becomes liable as being negligent or deficient in its discharge of duty. This is to make it an insurer of the property, whereas what it is bound to do is simply to do what a man of ordinary prudence under the circumstances would do. In other words, as the Illinois Central at Southport had its hose 100 feet in length for the purpose of protecting its property, this company, presumably, might do the same, although even the standard of the Illinois Central at Southport is not a standard controlling in the premises.

It was further argued by plaintiffs that comparison of the number of watchmen employed by defendant with the force of the Illinois Central at Southport shows that an insufficient force was employed. But the Illinois Central depended entirely upon the hose and twenty-five fire extinguishers. They had no barrels or buckets. They added to these appliances the extra watchmen. But the record contains clear evidence that extra watchmen with all the appliances of

the City Fire Department added, and the cotton covered with tarpaulins, would not prevent loss. The West India wharf burned in daylight in the city, with extra watchmen, City Fire Department, etc., etc. (Testimony of Sanders, Record, p. 111).

But we insist that the rule laid down by Justice FIELD in Transportation Company vs. Downer applies, and that is that where the loss may have been sustained under circumstances consistent alike with the highest care and skill, or with negligence and inattention, that in such case the burden of proof of showing that it is the latter cause rests upon the plaintiffs. We insist further that looking at the testimony of Robeau fairly, with all the presumptions of diligence on the part of the defendant and of its servants, which the plaintiffs must overcome, that they have not overcome these presumptions, and that the action of the courts below was correct.

Valle may have judged in the hurry and excitement of the circumstances under which he was placed that the most effective method for him to adopt in the utilization of the appliances for the extinguishment of this fire was to do, that which he apparently did do, to wit, take the hose, pull it out so far as he could, and turn the valve on full, in the haste and hurry of the moment, not anticipating that which did happen, a greater pressure of the water in the hose than he had foreseen, thereby entirely choking the flow of the water through the hose. This would be a mistake of judgment in the endeavor diligently and efficiently to accomplish the purpose for which he was set, to wit, the extinguishment of the fire.

This is one hypothesis, at least, which is reasonable upon the testimony of Robeau. To submit the case to

the jury to determine what Valle did before Robeau got there, is, in view of what Robeau states respecting the situation of affairs, to allow the jury to guess as to what occurred; is to allow them to proceed upon conjecture and surmise and uncertainty. If the transaction can be explained upon the theory of an error of judgment, then the plaintiffs are not entitled to go to the jury. If it is equally explicable upon the theory of negligence, or upon the theory of an error of judgment or mistake, they are equally not entitled to go to the jury.

The rule as to the duty of a court to send a cause to the jury is too clearly established by decisions of this Court now to be controverted, and the doctrine, as we understand it, is substantially the same as that which obtains in the Court of Appeals of New York. Both tribunals cite decisions of the other as illustrating the position which they take respecting the duty of the court to submit a case to the jury, or to refrain from thus submitting it. The rule is very clearly put by Justice CLIFFORD in Improvement Company vs. Munson (14 Wallace, 442), quoted with approval in the recent case of Laidlaw vs. Sage (158 N. Y., 76). He says (p. 448):

"Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule—that, in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury

can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."

The rule is further stated by Justice HARLAN in Union Pacific Ry. Co. vs. McDonald (152 U. S., 283), as follows:

"Upon the question of negligence, the case is within the rule that the court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."

Del., Lack. & West. R. R. Co. vs. Converse, 139 U. S., 469, 472, and authorities there cited.

Elliott vs. Chicago, Milwaukee & St. Paul Ry., 150 U. S., 245.

Anderson County Commissioners vs. Beal, 113 U. S., 227, 241.

This question of what is negligence or evidence of negligence in a particular case has just been passed upon by the Court of Appeals of the State of New York in a case which presents considerations precisely similar in principle to those which we are now considering in seeking to determine whether the evidence of Robeau showed any negligence on the part of the defendant. In the case of John J. Lewis, an infant, by, &c., vs. The Long Island R. R. Co., appellant, 162 N. Y., 52, the question was presented as to the conduct of the engineer of the defendant and as to whether or not he had acted with due diligence under the circumstances. The following extract from the opinion presents the facts and the conclusion of the court in very clear terms:

"At the conclusion of the principal charge the plaintiff requested the court to charge as follows: 'If

you find that the engineer of the defendant's train, after seeing the horses attached to the tally-ho in which the plaintiff was seated, omitted to do any act which might have prevented the collision or might have lessened the danger to plaintiff, the defendant was guilty of negligence." The court so charged, and the defendant excepted. The appellant now urges that this was error, for which the judgment should be reversed.

"The engineer upon the defendant's train first saw the leaders of the team attached to the tally-ho when the train was about 400 feet from the crossing. It was then running at the rate of 35 miles an hour, and did not he attempt to stop it until he saw the team come upon the track, when he applied the emergency brake and reversed the engine. At the rate of speed at which the train was running only about eight seconds elapsed after he first saw the horses when the collision occurred. Thus he was suddenly confronted with an emergency, having but a few seconds in which to take such precautions as were possible to prevent the accident or mitigate the injury. The acts necessary to stop the train were described upon the trial, and the engineer testified as to what was done. The effect of this charge was to instruct the jury that, if the engineer omitted any one thing which might have prevented the collision or lessened the danger, the defendant was guilty of negligence. This in effect was an instruction that, if the jury should find that any such act was omitted, then, as a matter of law, the defendant was negligent. * * *

"It is often the case that, after a transaction has occurred, the most careful can discover that a different course of action might have prevented a calamity, or at least have mitigated the injury. Still, when an emergency presents itself, and a person is under great excitement from the presence of an impending peril, he may not act with that perfect judgment that he would under other and different circumstances. 'Railways are not liable for a mistaken exercise of judgment upon the part of their servants, * * * to act with the utmost possible promptitude, when the circumstances are such as to afford no time for deliberation' (Patterson's Railway Accident Law, p. 111). Where an employee of a railway company is confronted with a sudden emergency, the failure on his part to exercise

the best judgment the case renders possible does not establish lack of care and skill upon his part which renders the company liable (Wynn vs. Cent. P., N. & E. R. R. Co., 133 N. Y., 575). It is not responsible even for his error of judgment (Bittner vs. Crosstown Ry. Co., 153 N. Y., 76; Stabenau vs. At. Ave. R. R., 155 N. Y., 511)."

The principle as related to the case at bar is brought out clearly in the case of Wynn v. Cent. P., N. & E. R. R. R. Co., cited *ante* in the foregoing quotation. The facts in this case were that a street car was upon a down grade, and running away, when the driver sought to check it by a sharp and sudden application of the brake. The result of the driver's action was, the brake-chain broke, the horses became unmanageable, and the car, after running some distance by the force of gravity, collided with another car standing upon the track, in which was seated the plaintiff, who was thrown from the seat and injured. It was claimed that the driver had not done all that he might have done—that his judgment was at fault in the use of the appliances at his command—that he might have derailed the car by means of the horses, and thus prevented the collision and consequent injury. Upon the trial the case was submitted to the jury upon these questions, and a verdict was rendered in favor of plaintiff upon which judgment was entered, and the General Term of the Court of Common Pleas affirmed this judgment. In the Court of Appeals it was claimed that the driver used more force than necessary in applying the brake, and that this resulted in the accident; the court say:

"The case is without evidence, tending to show that he was not an entirely fit man for the position, and there is the same absence of any evidence tending to

show that he did not use the necessary and proper degree of care and skill at all times upon that trip and up to the time of the collision. When just prior to the breaking of the chain he used the brake two or three times to check the speed of the car on account of the driver of the weiss beer wagon getting on the track in front of him, he says he was entirely unconscious of using any more strength upon the brake than was necessary for the purpose of accomplishing his object. He says it was not necessary and he does not remember that he did. But even if he did use more force than was necessary there was no want of skill in that, and if the chain was as strong as it was intended to be and the purpose of its use called for, there was no harm or injury in such a use. It would be improper to submit the question of lack of skill or of negligence in the driver, based upon evidence that he had used more force in handling the brake than was absolutely necessary to check the speed of the car.

"At any rate, there was no evidence that he did so, and a jury should not be allowed to speculate or indulge in a mere guess upon such a matter. There must be at least some evidence upon which the question of a want of skill can be based, and here there was none. * * *

"It is also alleged that he should have turned his horses out at right angles with the rails and thus have dragged the car across and thrown it off the track. Had he done so and succeeded in overturning the car, considering the speed the car then had, it is quite likely that a worse accident would have occurred and that a charge of unskillfulness or negligence on the part of the driver would have had much to sustain it under such facts. These are, however, but the possible actions which the counsel for the plaintiff thinks now might have been performed by the driver. There is no evidence to show that they would even probably have been effectual. He was confronted with a sudden emergency, and we cannot now say that his action was not the best that could have been performed under the circumstances. Even a failure to exercise the best judgment which the case rendered possible cannot fairly be claimed as evidence of a lack of care or skill."

The Court, therefore, by reason of the erroneous submission of the case to the jury, concludes as follows:

"For the erroneous submission of the question as to the skill of the driver to the jury, the judgment should be reversed and a new trial granted, costs to abide the event."

The court held, as shown by the conclusion of its opinion that the question of the failure of the driver to exercise his best judgment under the conditions could not be submitted to the Jury.

In Bittner vs. Crosstown Ry. Co. (153 N. Y., 76) a case very close in point was considered. The facts in the case were that a boy was knocked down by a car. It was claimed that the motorman in his effort to stop quickly, reversed the action of the motor upon the car and in so doing caused the car a second time to pass over the boy, and that this action of the car by reason of the reversal of the motor caused the death of the boy. This action of the motorman was the principal ground of negligence considered by the Court of Appeals, and the error in the instruction given respecting this phase of the case was considered in the following portion of the opinion by the Court of Appeals:

"The defendant was entitled to have the jury clearly instructed that an error in the exercise of judgment by the motorman would not make the defendant liable for the result in the management of the car in the emergency which occurred after the deceased was struck down, and the charge did not cover that point, or at least not in such exact language as in our judgment would make it perfectly clear to the jurors' mind. To instruct them that, if the motorman was careless in so managing his car as to run back upon the boy, the plaintiff might recover, was not the clear equivalent of the instruction that if the motorman erred in judgment after the car

struck the boy, the defendant would not be responsible for that error of judgment. The evidence in the case would have warranted the jury in finding that the deceased was guilty of contributory negligence in placing himself directly in front of the car and that the motorman was not guilty of negligence in striking him. If they should have reached that conclusion and were brought face to face with the subsequent situation after the boy had been knocked down and run over, they could only return a verdict for the plaintiff upon the basis of some act of negligence then occurring on the part of the defendant's servant, the motorman, by which the accident was aggravated. If they could believe the evidence of the witness Toms, that the car had passed so far beyond the boy and then, while he was still alive, was backed down upon him and again was sent over him, they could, perhaps, say that the motorman was careless in the management of his car at the time and that through such carelessness the boy was in fact killed. But if they believed that the motorman was endeavoring, in the exercise of his judgment, to prevent injury to the boy, then there was no carelessness on his part, but merely an error of judgment, for which the defendant could not be held responsible. Upon the evidence it appears that the motorman was confronted with a sudden emergency, and it should have been distinctly stated to the jury that if, in what he did, he used his judgment, the defendant was not responsible, even if it was an error which brought about the lamentable result claimed. Even the failure to exercise the best judgment would not be evidence of negligence."

This case was followed by Stabenau vs. At. Ave. R. R. Co., in 155 N. Y., 511. This was also the case of an electric car, in which it was claimed the motorman in charge of the car had not applied the brake sufficiently quick to prevent running over the child attempting to cross the track, and also because he had used the brake instead of some other appliance upon the car used to govern electric motive power. It was claimed that if he had used the other appliances upon the car instead of attempting to stop the car by the brake, the

girl's life might have been saved, and that, therefore the company was responsible. Upon this point the Court of Appeals say (p. 515):

"Nor can negligence be predicated upon the use by the motorman of the brake, instead of the particular appliance used to govern the electrical motive power. In the emergency one of two courses was open to him, and it is impossible to say that the one adopted was not as effective as the other under the circumstances. It appears by the evidence that a sudden reversal of the electric power sometimes operates, as the plaintiff's witness said, 'to blow out the fuse;' in which case, the power to control is lost. The motorman testified to having heard of that happening often. Whether the one or the other means provided for stopping the car should have been adopted was a matter for the exercise of the motorman's judgment, and, though newly employed, he was not shown to be incompetent. For an error in its exercise the defendant could not be held responsible. Even the failure to exercise the best judgment would not have been evidence of negligence."

The same principle is approved in the case of Union Pacific Railway Company vs. McDonald, 152 U. S., 262.

Justice HARLAN says (p. 281):

"The authorities cited, indeed all the adjudged cases—agree, as declared by the Court of Appeals of New York, that in applying the rule that a person who seeks to recover for a personal injury, sustained by another's negligence, must not himself be guilty of negligence that substantially contributes to the result, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition (Reynolds vs. N. Y. Central, &c., Railroad, 58 N. Y., 248, 252). And so, as declared by the same Court, persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases (Thurber vs. Harlem Bridge, &c., Railroad, 60 N. Y., 326, 336)."

See, also,
Banks vs. H. St. Ry. Co., 136 Mass., 485.
Bell vs. H. & St. Jo. R. R. Co., 72 Mo., 50–60, 61, 62.

The plaintiffs in the lower courts insisted that they were entitled to go to the jury because their testimony left wholly uncertain the causes of the condition of the hose at the time. The defendant insists that, precisely because the testimony left this cause of the hose thus uncertain, is a clear reason why the case should not have been sent to the jury. The testimony left it to the jury to guess as to whether or not the condition of the hose might not have come from Valle's error of judgment in turning on the water before he stretched the hose or before he laid the hose in such a way as to prevent the pressure from pushing its coils into each other, or whether it occurred from the accident of pulling the whole coil of hose off of the platform, and not observing it before he turned the water on, or on any of the other possible hypotheses upon which the condition of the hose may be explained. It is not incumbent on the defendant to explain which of these possible hypotheses is the true one, but it is the duty of the plaintiff in order to be entitled to go to the jury to produce some testimony tending to show, under the rule announced by Justice FIELD in Transportation Co. vs. Downer, that this condition of the hose was occasioned by the neglect of the defendant. The fact that the hose was tangled does not help the plaintiffs. How and when did it become so? Was it thus tangled by Valle's efforts to use it, or prior thereto? Was such result produced by the water pushing into the coils when the valve was opened? Where is any testimony by which a jury can do aught

but conjecture as to any of these queries. But it is not permissible to send a case to the jury to guess out the result.

As to the right to send a case to the jury under such testimony for the purpose of conjecturing and guessing as to the cause of a certain state of facts, the case of Improvement Company v. Munson (14 Wallace, 442) is quite clear that there must be more than a mere scintilla of proof ; that there must be something definite upon which the jury can proceed in order to justify the submission to it.

The opinion of Union Pacific Railway Company vs. McDonald (cited *ante*) established the same duty of the Court, because in that case it was attempted to insist upon certain conjectures respecting the conduct of the plaintiff which it was claimed amounted to contributory negligence.

The New York Court of Appeals had occasion to consider this whole question as to what is proper to submit to a jury in the recent case of Laidlaw vs. Sage (158 N. Y., 76), in which the plaintiff claimed that, although the defendant was not responsible to him for the consequences of an explosion caused by a third party in the defendant's office, yet he was entitled to recover for the injuries which he sustained by reason of his being unlawfully moved from one position in the office to another by the defendant. The testimony in the case showed that the explosion of a quantity of dynamite had entirely wrecked all parts of the office, a large room 30 by 26 feet, and injured persons in different parts of the office. The contention of the defendant was that to send the case to the jury upon the question of whether the plaintiff was injured more in

a particular spot than he would have been 18 or 20 inches to the right or left of that spot was to give the jury nothing but the merest conjecture, guess, or speculation. On the part of the plaintiff it was claimed that there was some testimony as to the lines of explosion, the fractures of the beams or joists in the floor of the office, and some matters of that sort which would entitle the jury to find that the plaintiff would have been less hurt if allowed to remain at the place where he was standing before it is claimed the defendant moved him, than he was hurt at the place to which the defendant moved him; and upon the submission of the evidence to the jury, the jury rendered a verdict of $40,000 in favor of the plaintiff. Upon this point, after citing a large number of authorities, at page 97 the court says:

"Thus we see that this court has, in a long line of decisions uniformly held that to justify a submission to the jury of any issue, there must be sufficient proof to sustain the claim of the party upon whom the onus rests, and that mere conjecture, surmise, speculation, bare possibility, or a mere scintilla of evidence, is not enough. When the principle of these cases is applied, it becomes obvious that the court was not justified in submitting to the jury the question whether the plaintiff suffered any substantial damages by reason of his having been moved in the manner claimed, even though it should find the defendant moved him. No one can read the evidence in the record as to the nature, power and effect of the explosion, and the results that followed, without reaching the conclusion that it utterly failed to show that the plaintiff was more seriously injured than he would have been if he had remained where he claims to have first stood. Indeed, we can find no proof sufficient to justify the conclusion that there was any place of safety, or comparative safety, in any of the rooms occupied by the defendant. The explosion swept with terrific force over them all, destroying or seriously injuring every person or thing with which it came in contact. Under such circum-

stances, to permit a jury to guess or conjecture that the plaintiff's injuries were more serious or severe than they would have been if his position had not been changed, is, in the language of Judge GRAY, 'to withdraw from the litigant a safeguard intended for the protection of his rights.' We think the court erred in not directing a verdict for the defendant, at least so far as substantial damages were concerned, upon the ground that there was no sufficient proof that the plaintiff sustained any injury in consequence of the alleged conduct of the defendant."

Some of the cases cited by the Court of Appeals in this opinion are of value on the precise question we are considering here, because the New York Court of Appeals, upon the subject of the duty of the court as to the submission of a case to a jury, is exactly in line with this Court upon that question.

Thus, in Baulec vs. N. Y. and Harlem R. R. Co. (59 N. Y., 356), the question involved the liability of the defendant for the action of a switchman who was claimed to have been incompetent. The testimony was that on one prior occasion a similar alleged act of negligence had been committed by him and the testimony tended to show that the general superintendent of the defendant had investigated this accident and concluded that it was not the fault of this switchman. Notwithstanding this, upon trial a nonsuit was ordered against the plaintiff. An appeal was taken to the Court of Appeals, and the court (p. 365), through ALLEN, J., says :

" I am clearly of the opinion that there was not sufficient evidence to carry the case to the jury. A verdict against the defendant based upon this evidence would have been against evidence. Such being the case, it was the duty of the court to nonsuit. This case is reported upon a former trial (5 Lansing, 436), and the decision there made is quoted with apparent approval by Mr. Wharton in his recent treatise

on the law of negligence, and the principle there decided makes a part of the text of section 238 of that work. It is not enough to authorize the submission of a question, as one of a fact, to a jury, that there is "some evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, would not justify the judge in leaving the case to the jury" (per WILLIAMS, J., Toomey v. Railway Company, 3 C. B. (N. S.), 146). The same learned Justice adds that every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. In another case it is held that a judge will not be justified in leaving the case to the jury when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. In such case the party affirming negligence has altogether failed to establish it, and EARLE, C. J., says, "that is a rule which ought never to be lost sight of" (Cotton v. Wood, 8 C. B. (N. S.), 568). This rule applied to this case leads to an affirmance of the judgment, for it cannot be denied that the evidence is as consistent with the idea that the defendant did carefully investigate the occurrence of which evidence was given, and with proper prudence and in the exercise of due care continue McGerty in its employ, as that they were negligent in the performance of that duty and carelessly or imprudently retained him with knowledge that he was not a proper man for the position. At most the jury could only conjecture that the defendant might have been waiting in the care and caution proper to be exercised in such a case, and if so the case was properly withheld from the jury" (Avery v. Bowden, 6 E. & B., 973, 974; McMahon v. Lennard, 6 H. of L. Cases, 970, 993).

In Bond v. Smith (113 N. Y., 378), the question was again considered upon a case where the plaintiff's intestate was found in an open area belonging to the defendant adjoining an alley which was faced with a stone coping. The alley was used by persons having business with the rear of the buildings, and the plaintiff's intestate was found in the area where he had fallen

during the night. How he happened to fall was unknown. The defendant insisted that a nonsuit should be granted, while the plaintiff insisted that under all the facts he was entitled to go to the jury. He was permitted to go to the jury, and a judgment was rendered in favor of the plaintiff and an appeal taken to the Court of Appeals from this judgment. EARL, J., examining the case upon the question says (p. 385):

"How, then, did the accident happen? How came he to fall over this stone coping into this known place of danger? The evidence does not tell us. It is an unsolved mystery. No plausible theory can be suggested to account for it. It is, however, plain that he could not have fallen into it while passing along the street. He must have departed from the street and thus have gone over the stone coping. It is impossible to conceive how he could in the exercise of ordinary care and prudence have fallen into it. We have no right to guess that he was free from fault; it was incumbent upon the plaintiff to show it by a preponderance of evidence. She furnished the jury with nothing from which they could infer the freedom of the intestate from fault. She simply furnished them food for speculation, and that will not do for the basis of a verdict. The law demands proof and not mere surmises. The authorities are ample to show in such a case the plaintiff should have been nonsuited."

In Pauley vs. Steam Gauge and Lantern Co. 113) N. Y., 90), the question was likewise considered. In this case the action was to recover for the death of plaintiff's intestate in a fire which occurred in defendant's factory. It was claimed that the defendant had neglected to comply with the act respecting the construction of fire escapes. There was considerable controversy in the case as to whether or not the defendant had complied with the statute. The testimony did not define the manner in which the intestate lost his life save that he was in the building and burned with a

large number of other persons. There were various groups of bodies of the dead at different points in the building, some of whom it was claimed were left to be suffocated by the smoke or destroyed by the fire by reason of the alleged want of proper location of the fire escapes. The position in which the intestate's body was found left it uncertain whether he had fallen to that point with the floors or whether he had crawled into that position from a certain chute. Upon this state of the testimony a nonsuit was granted at the trial and the General Term granted a new trial on the exceptions. In the Court of Appeals, FINCH, J., says:

"The evidence, thus so far from tending to sustain the theory of the complaint, tends only to disprove it, and no judgment founded on it can be sustained.

"But the respondent and the General Term insist that some other theory may be adopted, and in order to do so, enter upon the realm of conjecture, and ask that a jury, in the utter absence of proof, may be allowed to guess that there was some negligence on the part of the defendant which might have tended to cause the death of the intestate."

After considering various theories respecting the manner in which the accident might have happened, the opinion proceeds:

"A mere conjecture built upon a bare possibility will not suffice to transfer the money or property of one man to the possession or profit of another. As we said in Bond vs. Smith (113 N. Y., 378), food for speculation will not serve as the basis of a verdict."

In Linkauf vs. Lombard (137 N. Y., 417), the Court re-announced the same rule, where a shipping contract was made by the plaintiff with a person who signed himself as agent. There was no such steamship company incorporated, but the steamship enterprise was

conducted by the manufacturing corporation which had no power to engage in such an enterprise. The defendants, as officers of that corporation, had the entire management and unlimited control of the business. The steamers were chartered by agents of the corporation. All moneys received were paid to and all expenses incurred paid by it. The Court submitted to the jury the question of the liability of the defendants, which rendered a verdict in favor of the plaintiff and judgment was entered and the same affirmed at General Term. The Court, however, reversed the judgment, saying:

"At most it was only open to surmise that the defendants were individually concerned in running this steamship line and that was not enough to justify the trial judge in letting the case go to the jury. To permit a jury to speculate and surmise upon the question of responsibility is to withdraw from a litigant a safeguard intended for the protection of his rights. He is entitled to the judgment of the Court upon questions to which the character of the evidence admits of but one answer. No such possibilities of a failure of justice should be countenanced. In the case of Improvement Co. vs. Munson (14 Wall., 442) Justice CLIFFORD well said: "Nor are judges any longer required to submit a question to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that, if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of a high authority have established a more reasonable rule: that in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the *onus* of proof rests."

"The rule should be regarded as settled under all the authorities, as well by the decisions of the courts

of this State as by those of England, that where there is no evidence upon an issue before the jury, or the weight of the evidence is so decidedly preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct the verdict, as the case may require. Reference to the following cases will suffice (Rudd vs. Davis, 3 Hill, 287; 7 id., 529; People *ex rel.* Peck vs. Board of Police, 35 Barb., 651; Herrick vs. Hoppock, 15 N. Y., 409; Wilds vs. R. R. Co., 24 *id.*, 430; Corning vs. Troy, etc., Factory, 44 *id.*, 577; Neuendorf vs. Insurance Co., 69 *id.*, 389; Dwight vs. Germania Ins. Co., 103 *id.*, 341; Schofield vs. Railway Co., 114 U. S., 615–619; Gunther vs. Ins. Co., 134 *id.*, 110, 116; Met. R. Co. vs. Jackson, 3 App. Cas. L. R., 193, Lord BLACKBURN'S opinion)."

The testimony of Robeau and the facts therein stated come within the principle suggested by Justice FIELD in the opinion in Western Transportation Co. vs. Downer that where the facts are as consistent with care and diligence on the part of the defendant and its servants, as they are with the negligence and inattention of the defendant, the case must not be submitted to the jury, because it would be a mere conjecture for the jury whether the loss was the result of negligence, or was the result of accident. In the case of Baulee vs. N. Y. & Harlem Railroad Co., cited *ante*, the rule is definitely stated as follows:

"It is the settled principle in the law of negligence which it has been said should never be lost sight of, that, when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence, the case should not be submitted to the jury, since in such a case the evidence fails to establish the essential fact."

This principle was cited with approval in the case of Ruppert vs. Brooklyn Heights R. R. (154 N. Y., 94); but it is also said in this latter case, in order to prove

a fact by circumstances, there should be positive proof of the facts from which the inference or conclusion is to be drawn. The circumstances themselves must be shown and not left to rest in conjecture, and when shown it must appear that the inference sought is the only one which can fairly and reasonably be drawn from the facts (People vs. Harris, 126 N. Y., 429).

The same principle is applied in the case of Cadwell vs. Arnheim (152 N. Y., 182), in which a runaway team attached to a coach caused some damage, and in which the opinions of experts were put in evidence tending to show that the defendant's coachman ought to have controlled the horses and prevented the injury. The coachman testified as to what he did respecting the team, and as to the cause of the accident, which was something for which the defendant was not responsible. The case was submitted to the jury and resulted in a verdict for the plaintiff and an affirmance by the General Term of the judgment entered upon the verdict and the defendant appealed to the Court of Appeals. Upon this the court say:

"In the course of the affairs of life accidents must happen, and if they are not attributable to the breach of some legal duty owing to the sufferer he is without legal right to complain. In actions for the recovery of damages charged to the negligence of a defendant it must appear that there has been some breach of duty on his part, or of those towards whom he stands in the position of a master, and affirmative proof must be given which shows or tends to show the negligence of the master or servant. It will not do to submit the question of negligence to a jury where the facts are equally consistent with the presence or absence of negligence, or where the jury could do no more than surmise as to the negligence of the defendant."

In Laidlaw vs. Sage, cited *ante*, the doctrine of Ruppert vs. Brooklyn Heights R. R., cited above, is quoted with approval, and the rule is stated, as follows:

"When the damages claimed in the action are occasioned by one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, the plaintiff must fail if the evidence does not show that the damage was produced by the former cause, and a jury must not be left to mere conjecture; and a bare possibility that the damage was caused in consequence of the act of the defendant is not sufficient." Citing Searles vs. Manhattan Ry. Co., 101 N. Y., 662; Ring vs. City of Cohoes, 77 N. Y., 83; Taylor vs. City of Yonkers, 105 N. Y., 202; Ayres vs. Village of Hammondsport, 130 N. Y., 665; Grant vs. Pa. & N. Y. Canal & R. R. Co., 133 N. Y., 657.

This is, however, only a variation of the rule that the plaintiff must fail, unless he shows (1) negligence, (2) loss, directly resulting from such negligence. All presumptions favor the defendant charged with negligence, and the plaintiff must overcome these presumptions by excluding any reasonable inference from the evidence, except that of negligence. This the plaintiff in this case has not done.

The testimony must not admit of any other reasonable hypothesis than that of negligence of the defendant respecting the cause of the loss, and must be more consistent with that theory than with any other. If it is equally consistent with the theory of accident, or that of a mistake of judgment on the part of the defendant's employees, then the case should not be permitted to go to the jury. This was a case of that character in all respects, and the action of the court in refusing to send the case to the jury and in directing a verdict for the defendant was right and should be affirmed.

Respectfully submitted,

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No. 86.
Suppl. Brf. of Taggart & Masten for P. E.

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No. 86.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER and PAUL LEON ROEDERER,

Plaintiffs in Error,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

Supplemental Brief of the Texas and Pacific Railway Company.

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OCTOBER TERM, 1901. NO. 86.

LOUIS AUGUSTE MARANDE, JULES EMILE ROEDERER and PAUL LEON ROEDERER,
Plaintiffs in Error,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

SUPPLEMENTAL BRIEF OF THE TEXAS AND PACIFIC RAILWAY COMPANY.

Our brief filed in this case was prepared before we had an opportunity to examine the brief of the plaintiff in error, and therefore to notice and correct some very material references in that brief to the testimony in the case. We therefore now take the opportunity in this supplemental brief of alluding to certain statements respecting the testimony and correction of what we deem to be material errors of fact.

I.

In the statement of facts and in the argument it is alleged that the fire by which the wharf was consumed broke out within a few feet of the place where the locomotive was upon the wharf the day of the fire (Brief, pp. 6–30). This is exactly contrary to the testimony, and contrary to the finding of the Circuit Court upon the trial of the case. The wharf stood upon the bank of the river nearly north and south. The upper or north shed was the one in which the fire broke out, and the fire occurred in the upper part of this north shed near the north end of the wharf (Robeau's testimony, pp. 152, 160; Gassenberger, p. 113). The steamship "Malabar" was loading opposite the lower end of No. 1 Shed, or the south shed, six or seven hundred feet further down the river near the south end of the wharf, and was lying with her bow upstream, No. 3 Hatch being near the stern of the vessel. The testimony of the witnesses cited, *post*, indicates that the locomotive was on the wharf in the neigborhood only of No. 3 Hatch. Thus, Ellis says (p. 87): "I saw that locomotive just a little past No. 3 Hatch."

Nie says:

"Near 12 o'clock, a locomotive came on the wharf and she passed up by No. 3 Hatch. About how far up she did go I don't know, but she passed the hatch where I was working; she passed right in front of the hatch. The distance may be ten feet, or it may be fifteen or twelve, something like that. I don't know exactly the measurements, but I couldn't help noticing it because we stopped work when the locomotive came up. The trucks couldn't get in. I went off to dinner and when I came back she had gone. How long she stayed I don't know. I am positive that that engine was there that day. She had some cars with

her and she passed on by the No. 3 Hatch. I am sure of that. The engine itself passed there" (Record, p. 89).

As to the position of the Malabar, the same witness locates it as hereinbefore stated (Record, p. 80). On cross-examination, he is unable to state whether there were ten or fifteen cars that were being pushed up ahead of the locomotive (Record, p. 91).

Stytch says:

"I saw the engine on the wharf and the cars abreast of the No. 3 Hatch, where I was working. She was right abreast of No. 3 Hatch when I saw her" (Record, p. 92).

On cross-examination, he says:

"There were a good many cars with her. The engine was right abreast of No. 3 Hatch. The cars were ahead of the locomotive up the wharf. The engine was headed up the wharf and was pushing the cars up. I couldn't say how long the engine stayed there. They were unloading the oil cake a little above No. 3 Hatch" (Record, p. 93).

On further examination, he says:

"Q. Did you see the engine as far as it went? A. I only saw it going toward that No. 3 Hatch.
"Q. Where did she stay? A. She stayed there.
"Q. Didn't she go in higher? A. No, sir; she stopped there" (Record, p. 94).

John Reinhard says:

"I seen a locomotive on the wharf right abreast of No. 3 Hatch" (Record, p. 95).

On cross-examination, he says;

"This No. 3 Hatch was right even with the cotton shed, the lower end of the cotton shed down town. No. 3 Hatch was right even with the lower end of the shed. * * * This No. 3 Hatch was right even

with the cotton wharf—right even with the lower end of the cotton wharf" (Record, p. 96).

The testimony thus very conclusively shows that the statement that the locomotive was within a few feet of the place where the fire broke out is pure fiction. This also clearly appears from other considerations. The uncontradicted evidence shows that not less than 10 cars were attached to the engine which it was pushing upon the wharf for the purpose of unloading. These cars would prevent the engine from approaching at least within the space covered by them to the upper end of the wharf, and this space covered by the cars would amount to from 300 to 350 feet of the upper end of the wharf. In addition to that, the testimony of Miller (p. 19), is that the sheds on the wharf were from 250 to 300 feet wide, and the track on which these cars ran was in front of the shed and between the shed, and the river. The testimony of Robeau is that the fire broke out within 10 feet of a hydrant. And in the upper part of the upper shed (Record, p. 158). Miller's testimony is that the pipe ran along the centre of the sheds and three hydrants were attached to the pipe in each shed (Record, pp. 18, 20). Presumably they were spaced at equal distances so the 100 feet of hose could be used most effectively. This would bring the fire well up to the upper end of the shed, for it would locate the fire near the upper hydrant. Therefore, the uncontradicted testimony, even conceding all the legitimate inferences that can be drawn from the evidence, places the locomotive that was upon the wharf on the day of the fire from 200 to 400 feet from the place where the fire broke out, and entirely outside of the shed. Furthermore, the locomotive was in a

southeasterly direction from the place where the fire broke out, while the direction of the wind was either from the east or northeast all that day, particularly from eleven o'clock in the forenoon, when the engine was there, until night (Testimony of Kerkam, Record, pp. 119, 120).

The statement is further made in the brief that the Circuit Court, in its opinion, overlooked altogether the testimony that the locomotive was in the habit of going on the wharf in the evening and hauling out the empty cars and placing in full ones, so that the men could go to work in the morning with full cars awaiting them (Brief, p. 6). The citation to the testimony is to that of Coffey (Record, p. 74), The context, however, clearly shows that, where he speaks of the engine taking out in the evening cars that had been unloaded, it is with reference to cotton cars, none of which were placed upon the wharf track at any time, but all of which were placed on the tracks in the rear of the wharf, and that the testimony has no relation to the track which was occupied by the cars and the locomotive on the day in question (Testimony of Coffey, Record, p. 74).

In addition to that, there is no testimony from any witness suggesting that, on the evening in question, the locomotive ran upon the wharf or was anywhere near the wharf; and, although Coffey, Trainor and Lecorgne and a number of other witnesses were called, and examined respecting the situation of affairs at the dock on the evening in question, not one witness was interrogated upon the presence of the locomotive near the wharf on the evening of the fire, nor was it suggested by any one that any locomotive was anywhere near this wharf at any time after 12 o'clock on the

12th of November. In addition thereto, as the Circuit Court and the Circuit Court of Appeals found, there is not a particle of evidence to connect the locomotive with the fire in any respect (Record, pp. 163, 200). The testimony does not disclose that the locomotive emitted any sparks, or dropped any coals, or that it was likely to do so. On the contrary, the testimony tends to show that its coming on the wharf in the manner it did this day was a usual and customary thing, and thus tends to disprove the likelihood of its emitting sparks, or being in any sense a source of danger to the cotton.

II.

The further suggestion is made in the brief that a "secret" understanding or peculiar contracts, made by the railway company with the steamship companies, was the cause of the accumulation of cotton at Westwego; that under these contracts the steamship companies were under no obligation to take delivery at any special or reasonable time, and that the delay in the arrival of vessels at New Orleans placed the steamship companies under no legal liability to the defendant (Brief, p. 25). This statement seems to us a complete misconception of the relation of the railway company to the shippers of cotton, as well as of the relations of the steamship companies to the railway company and to the shippers of cotton under the arrangements which were shown in the evidence in this case. The assumption underlying this statement in the brief is that under shipments such as those in

question in this case the railway company had entered into an obligation with the shipper to carry this cotton from the point of shipment to the point of destination, and that the steamship companies were a mere agency which the railway company could look to for carrying out that part of its undertaking, covering the route from New Orleans to Havre, and that the shipper could look wholly to the railway company for the performance of the entire undertaking. The testimony in this case justifies no such assumption. In the first place, the bill of lading which is the contract with the shipper, is simply an undertaking by the railway company to carry over its own line, and then to deliver to a certain designated steamship line, which was thereupon to carry the same to the point of destination (Bill of Lading, Record, p. 169. Insurance Co. vs. Railroad Co., 104 U. S., 146, Myrick vs. Railroad Co., 107 U. S., 102). If these bills of lading had been issued without the knowledge or consent of the steamship company, possibly the claim of the plaintiff in error, that the steamship company could accept or refuse to accept this cotton as it pleased, might have some foundation. But when we turn to the testimony in the record we find that the steamship company had authorized the railway company to issue these bills of lading in this form to the shipper, by first entering into engagements with the railway company to take cotton from New Orleans to European ports at certain prices, knowing that, upon these engagements, bills of lading would be issued of the character in question in this case. This is clearly shown by the testimony of the steamship agents called, all of whom testified that engagements of this character were made by their lines

with the railway company, knowing that the railway company would, upon such engagements, go into Texas and arrange for shipments of cotton, and issue through bills of lading on behalf of the railway company or companies and the steamship company, and that under such engagements they would send their steamers to Westwego to receive the cotton (see testimony of Warriner, Le Blanc, Hammond, Ross andSanders, cited *post*, pp. 14–21). The bill of lading in this case was thus issued, based upon an engagement with Elder Dempster & Co. (Record, pp. 76, 174, 176).

The suggestion, however, seems to be that, where the statement is made on these engagements, "delivery unrestricted," the steamship companies were at liberty to take this cotton whenever they pleased, and it is claimed that the testimony establishes this fact. The only testimony upon this subject which we are able to find in the record is the following:

"Q. Was any time specified or understood between you and the Texas & Pacific Railway Company at which you should go to Westwego to receive cotton after it arrived there? A. No. The delivery on both sides was unrestricted.

"Q. Did the Texas & Pacific Railway Company give you any notice that you were bound to take or receive cotton at or within a specified time? A. No. There was never any complaint made to me by the Texas & Pacific Railway Company that I did not receive cotton on time that I know of" (Testimony of Warriner, Record, p. 41).

The only other witness upon the point is Sander's testimony as follows:

"Q. Please tell me what, in 1894, among the shippers and merchants centering in New Orleans, the words 'delivery unrestricted' meant. A. This is a peculiar form of delivery which is used only by the Texas & Pacific Railway Company and certain connec-

tions of theirs in Texas. The usual form of engagement note calls, as a rule, for a certain date of delivery to the vessel. The Texas & Pacific Railroad and certain connections, for many years, have used the unrestricted term, because they did not desire, as I understand it, to be held to deliver cotton at any specified date, and it has always been understood that the rule must work both ways; in other words, the railroad was not bound to deliver the cotton by any particular date, nor was the steamer obliged to take delivery of the cotton at any particular date. The restriction as to actual time has never been definitely settled. It might mean unrestricted for the whole term of the season."

On cross-examination, he further says:

"Q. You say this term, 'unrestricted,' was used only in T. & P. contracts of this character of engagements. A. My recollection is that it was used until possibly quite recently only by the T. & P. road and their connections. Now, there is a modification somewhat in this season and possibly last season. I think I am correct in saying that in 1894 only that road—I would like to qualify that if you will permit me. There are some of the connections of the T. & P. road, for instance, the Southern Pacific Company and other possible connections. The Southern Pacific road brings in cotton on such engagements as this, and the T. & P. road, as I understood, for reasons of its own, declined to enter into engagements in a great many cases to deliver at any particular time. The inference unquestionably was that the other party was entitled to the same right as to reception of the cotton. I never knew the Texas and Pacific to controvert that inference.

Q. Isn't it a fact that in conversations that Mr. Miller has insisted that the Texas and Pacific would not assent to that arrangement and insisted on the immediate reception by your own steamship line of the cotton when it arrived? A. I cannot say. Mr. Miller may have said so; but it certainly had no effect. We would certainly never dream, of course, of making an engagement which would be binding on one and not on the other. I could not say positively in regard to that; it may be so practically, of course it has been without result for the obvious reason that we could not agree to it" (Record, pp. 109, 110).

This is all the testimony in the case aside from the language of the contracts or engagements themselves (Record, pp. 176 and 177), and we respecfully submit that neither the testimony nor the language of the engagements justifies the suggestion inserted in the brief at a number of points that there were secret understandings and arrangements between the railway company and the steamship companies, relieving the steamship companies from any obligation to take this cotton promptly, and as a result that it accumulated upon the railway company's wharf. The form of engagement we think justifies exactly the opposite conclusion, so far as it has any bearing upon the subject at all. It is headed "Texas and Pacific Railway Company," and is addressed to the agent of the steamship lines, being in the nature of a letter, advising the steamship line that the railway company has engaged a certain number of bales of cotton for shipment by a particular steamship line at a particular rate, "delivery unrestricted." The testimony of Miller, the agent of the railway company, was that this engagement of a rate for a certain number of bales of cotton with the steamship line preceded the shipment of that cotton under through bills of lading by the railway company from points in Texas (Record, p. 22). This engagement, therefore, it is to be observed, is in effect an authorization by the steamship company to the railway company to make arrangements with shippers along its lines of railway for shipments, on through bills of lading, of cotton, at a through rate, to the amount of bales named in such engagement with the railway company. The knowledge of the steamship companies of the shipments under the through bills of lading, based upon the engagements made with them for the

ocean rate, would bind the steamship companies to receive and carry the cotton as contemplated by the provisions of the bills of lading. The delivery referred to in the engagement, evidently relates to the transfer of the cotton from the railway to the steamship line. This is in no sense a delivery by the steamship line. It is a receipt by the steamship line.

The effect of the construction contended for by the plaintiff in error is this: the engagement between the railway company and the steamship company requires the railway company under the authorization in the engagement to go into Texas, and make shipments of cotton under through bills of lading, with the knowledge and acquiescence of the steamship company, and in which the steamship company is named as the party bound to receive this cotton at the terminus of the railway, and thence to carry it to the destination; but, because the term "delivery unrestricted" is employed in the engagement between the railway company and the steamship company, the railway company alone is bound under the provisions of the bill of lading, while the steamship company is at liberty to receive this cotton at whatever time it pleases at the terminus of the railway, notwithstanding all the implications and provisions of the bill of lading issued with its consent, and based upon its engagement with the railway company. This, it seems to us, is to give a meaning to the term "delivery unrestricted" utterly unwarranted by any suggestion contained in the meaning of the term used, and utterly at variance with the whole course of business between the parties, and wholly contrary to the duties imposed upon the parties, under the circumstances and the course of business, by the terms of the bill of lading.

The fact that Mr. Sanders and Mr. Warriner drew the conclusion, or understood that the rule must work both ways, or held that the inference unquestionably was that both parties had that right, in no way establishes such a meaning to the engagement. Such inference, we think, contradicts the express terms of the engagement itself, which simply provides that the railway company is under no obligation to secure the shipment of this cotton under these bills of lading at such times that the cotton should reach Westwego at any particular period wfthout changing the duties of the carriers under the bills of lading. The bills of lading were issued on behalf of the steamship company as well as on behalf of the railway company or companies. In view of the testimony of the steamship companies' agents this was authorized and made them parties to the bill of lading and bound by their provisions (see Testimony of Warmier, Hammond, LeBlanc, Ross and Sanders). If the delivery were restricted, it would be that the railway company was obligated, during the month of October, if such were the expression on the engagement, or during the month of November, bring the cotton there, and deliver to the steamship. Such an engagement is found in the record, page 23. Under such an engagement we see no reason why it might not equally be claimed that the steamship company was at liberty to take its own time with respect to the receipt of the cotton as under the engagements involved in this case.

III.

The claim is made in the brief that there was not an established custom by which "Westwego" was included within the "port of New Orleans" as commercially understood, and, therefore, there was no right to carry the cotton to that place for delivery to the steamship company. This position ignores certain testimony in the case, and presents too narrow a view of the situation of affairs at Westwego and New Orleans. It ignores the fact that it was the universal custom that had obtained for many years, as testified to by the steamship agents, to transfer export cotton shipped on through bills of lading to the steamship companies at the terminals of the various railways. This custom obtaining with respect to railway shipments generally at New Orleans, it was not material whether the shipments by the particular point "Westwego" was long continued or not. Such shipments by this particular point would be like the addition of a new dock to the dockage facilities in Brooklyn, under such facts as obtained in the De Vato case, where it was already a universal custom for vessels consigned to the "port of New York" to unload at Brooklyn. This custom at New Orleans was clearly established as shown by the testimony which we shall presently call attention to. In accordance with this universal custom, the Texas and Pacific Railway Company, early in the year 1893, established this terminal point at Westwego for connection with the various steamship lines, and thereafter, as the testimony uncontradictedly shows, it was the sole point of receipt by the steamship lines, and delivery by the railway company, of export cotton. It

was well understood that Westwego was meant in all cases, although the "port of New Orleans" was the term expressed in the through bills of lading, in all shipments over Texas and Pacific Railway. This clearly appears from the testimony in the case of the steamship agents who were called by the plaintiffs in error, and who knew respecting the situation at Westwego and New Orleans. On this subject the testimony of Fornaris, steamship agent at New Orleans for 18 years, is as follows:

"Q. Did your line in 1894 receive freight or cotton at any other docks than your own? A. Yes, sir; we would take freight from other docks. I am familiar with the customs and usages existing in this port as to the shipment of cotton to the various ports in Europe and was familiar with such usage and customs in 1894.

"Q. I believe you stated you had some vessels load at Westwego? A. Yes, sir.

"Q. Under what conditions, Mr. Fornaris, if any, did your vessels go to Westwego? A. Whenever there was a sufficient quantity of freight to justify my sending a vessel over there.

On cross-examination:

"Our line was accustomed to go to Westwego as well as to other wharves where freight was to be delivered,—where we could get freight—whenever there was a sufficient quantity to justify our going there. Under a previous arrangement with the Texas & Pacific we made an engagement with them that if they had so many bales we would go there to take them. But we only made these arrangements to go there under those circumstances, and if there was not enough to justify me I would not send a ship there. I would not send a ship anywhere for ten bales of cotton. There had to be a sufficient amount of cotton to justify me in sending for it. That was true at Westwego, Southport, on this side, Algiers or anywhere" (Record, pp. 31, 33).

On this point, the testimony of Le Blanc, 19 years a steamship agent, is as follows :

" Our line has carried cotton from this port continually since I have been agent here. In 1893 and 1894 cotton that our line carried was delivered to our ships everywhere. Cotton was delivered to our ships at other places than at our wharves. I have been the agent of that line 19 years.

" Q. Did you have occasion during those years to receive cotton from the Westwego wharves ? * * * A. Oh, yes ; we carried considerable. That was in 1894. That cotton was delivered at Westwego by the Texas & Pacific Railroad. I think all cotton delivered to us that year via. the Texas & Pacific Railway was delivered at Westwego. Before the construction of the wharves at Westwego we carried cotton from the Texas & Pacific Railway Company. Delivery was made at that time, some times at their own wharf, on this side, and sometimes at ours. It was all delivered from the New Orleans side of the river. I have been to Westwego. I was never at Westwego before the Texas & Pacific Railway Company built there. I do not know of any vessel that ever discharged a cargo or any part of it at Westwego prior to the erection of the wharves there. I do not remember any. I am familiar with the customs and usages existing at the port—that is New Orleans—in relation to the shipping of cotton from this port to foreign ports. * * *

" Q. Will you state whether or not, in 1894, or the year that the Westwego wharves were burned, you had a contract with the Texas & Pacific Railway Company to transport any certain amount of cotton ? A. I am sure we had ; different contracts. We made engagements from day to day. We did not have a general contract with them. These contracts that I speak of were in writing. No time was specified in those contracts at which we should go to Westwego for the cotton. * * *

" Q. Were there any custom house restrictions at that time and prior to March 20, 1893, that you know of about steamers going to Westwego and loading there or discharging there ? A. My recollection is that we used to have a custom house officer there, I don't know that there were any other restrictions. We had to enter before we went there. I don't think we

had to get permission to go there from the custom-house authorities; announced our intention of going there and they sent an officer. The Government paid for that officer. The shipper or ship did not have to pay for the officer " (Record, pp. 47, 48, 49).

On cross-examination this witness said :

" When I said that our ships received cotton everywhere before 1894 and 1893 I meant that they went to various points to receive cotton. I should think the bulk of the cotton carried by the Harrison line was received at other points than their own wharf. That custom was universal with steamships landing here in New Orleans. That is, at the terminals of railways the steamship lines were all accustomed to receive cotton which was shipped over the various rail lines which was to go from the rail lines to the steamship lines. It was also for a long time before that the custom for the steamship lines and the rail lines to unite in making what we called a through rate, which was a combining of the local rates of the two. That is, the railway company at the point of shipment would make a through rate to the shipper, in Liverpool, we will say, and that would be based upon a contract with the steamship company, by which the steamship company would accept a certain portion of that rate from the railway as its share of the carriage. Those are the kind of contracts or arrangements that I speak of that were in force in 1894 between our line and the Texas & Pacific Railway Company, and it was in accordance with this custom, or an arrangement of that sort, that the reception of the cotton by the steamship lines was the terminus of the railway. And that was so in the case of the Texas & Pacific, and had been so for several years before 1894. * * *

" Q. It was the understanding, was it not, that in these written contracts for through rates Westwego was the place of reception by the steamship company of the cotton ? A. Yes, sir.

" Q. And that had been so for some years prior to 1894, hadn't it ? A. I think so.

" Q. This wharf at Westwego is not the only wharf of the kind where similar shipments are made, is it ? A. No. There were not many others. There were only two others, and there were in 1894 ; they were at Southport and Gretna. Gretna is opposite New Or-

leans, on the west bank of the river—the same side as Westwego—a little further down near the city. And Southport is higher up, on the same side as the city of New Orleans. The same method of handling and receiving cotton was observed there. * * *

"Q. And your understanding was that you had entered into an arrangement with the railroad company to receive from the railroad company that much cotton at that rate? A. Yes, sir.

"Q. At Westwego, in the case of the Texas & Pacific? A. Yes, sir" (Record, pp. 50, 51).

Hammond thus testifies:

"I am a steamship agent. I have been engaged in that occupation since 1875 in New Orleans. * * * I have one wharf at the foot of St. Mary Street, in the city of New Orleans, but I load many of my steamers at the different terminals as well. Those lines were engaged in carrying cargoes from here to Europe, cotton, grain and general cargoes. Prior to 1893 cotton was delivered to our ships for transportation by whoever we engaged it from; we engaged from the Texas & Pacific Railway Company all the time. Some was delivered at our wharf on the New Orleans side, and some at Westwego; ever since the wharf has been built we send our steamers over there under certain conditions. Prior to the time when the wharf was built when there was no place to send them, of course we did not send them there. Then it was delivered on the New Orleans side of the river at my wharf or other landing places of my steamers. * * *

"Q. Could vessels, in your knowledge, go to Westwego to load cargo without special permission from the custom authorities? A. No. We always got permission because it wasn't within the New Orleans custom district at that time. After that it was made part of the port of New Orleans, but I forget the year exactly.

"Q. What was the nature of this special permission? A. Simply to notify the custom authorities that we desired to go there. I never knew a vessel to go to Westwego to load her cargo without first having notified the customs authorities" (Record, pp. 55, 56).

On cross-examination:

"I say that prior to the erection of this wharf at Westwego any cotton delivered by the Texas & Pacific Railway Company was delivered on the New Orleans side. It is what we call the 'city front,' and is where ships are loaded from the elevator or from Eighth Street down to the water-works and below Canal Street.

"Q. And that is composed of some 30 or 40 wharves? A. Not quite so many; ten, anyway. It is a continuous levee for about a mile and a half. It had been granted us by the corporation, and we had not room there, and so we had to go in other places where we could put a ship in. The Texas & Pacific Railway Company did not have a wharf for export here on the New Orleans side prior to the erection of that one at Westwego. They used to deliver at our wharf where our ship was. That might be at any one of these docks in the city.

"Q. Now, then, that custom was about the delivery of cotton from the Texas & Pacific Railway Company here along the city front on this side, prior to the erection of this wharf, after the erection of the wharf at Westwego, that was the recognized place of delivery for export cotton, was it not? A. At Westwego—it was their terminal.

"Q. And the steamship company goes over there in order to get this cotton for export on its steamers? A. Oh, yes, they go there; that is, for a certain amount of cotton.

"Q. And, in making arrangements for this export cotton, it is the custom of your line, as well as other steamship lines, to make an arrangement for what is known as a through rate for cotton, is it not? A. Yes, sir. * * *

"Q. In those bills of lading based upon shipments under arrangement, such as you describe for a through rate, it was customary, was it not, to describe the point at which the railroad would deliver the cotton as New Orleans; don't you know that? A. Always.

"Q. And that was understood to be Westwego, was it not? In the case of the Texas & Pacific, between the steamship lines. A. Yes, sir; that is the way we understood it for not less than a thousand bales. After Westwego was built that was the understanding; but I am at a loss to know exactly when it was

built. And after this arrangement it was delivered at Westwego.

"Q. And, when New Orleans was named, Westwego was included in that term as far as the Texas & Pacific was concerned? A. Yes, sir. * * *

"Q. After the erection of the dock it was recognized as commercially within the port of New Orleans —there were regular deliveries at Westwego? A. We called it New Orleans, although it was not officially New Orleans.

"Q. And, under bills of lading for shipment by the Texas & Pacific, it means New Orleans, and the Hammond and various lines of steamers received cotton continuously at Westwego, did they not? A. Yes, sir; since the erection of the dock" (Record, pp. 54, 55, 57, 59, 61, 62).

Testimony of Ross:

"I am a steamship agent and have been such in the city of New Orleans 25 years. These lines were engaged in carrying all kinds of goods to various ports in Europe. They carried cotton. Prior to the erection of the dock at Westwego, which was destroyed by fire on November 12, 1894, cotton was delivered to my lines for transportation by other parties and different railroads in town. Some by the Texas and Pacific Railway Company. It was delivered to us by the Texas and Pacific Railway Company at our regular wharf. It was delivered by all railroad companies at our regular wharf. After the erection of the docks at Westwego, cotton was delivered to my line mainly at the same place. I am familar with Westwego, but I have not been there recently. * * *

"Q. At the time of the fire was Westwego commercially the same as the port of New Orleans? A. Now, I don't recollect the time that it was brought in by act of Congress. It was not so considered before that act was passed only by courtesy and agreement—agreement between the railroad and the ship, or the shipper and the ship."

On cross-examination:

* * * "You speak of special arrangement with the railroad company for delivery at Westwego, do you mean an arrangement such as has been testified to

here, by which there would be an engagement for a stipulated number of bales of cotton at a certain sea rate, and the railroad company would thereupon go into the interior, arrange with shippers for the shipment of that cotton over their own lines, and over the steamship lines with which the sea rate was made? A. I mean the railroad would make a contract with the steamship agent, just exactly as any shipper would do, for the carriage of a certain amount of cotton on the terms specified in that contract; that was the special arrangement I refer to. A part of that special arrangement would be that I would go to take such such freight to Westwego" (Record, pp. 62, 64, 65).

The testimony of Sanders:

"I represented the West India and Pacific Steamship Company. I had represented that company about ten years in New Orleans prior to 1894. * * *

"Q. Prior to the erection of the dock at Westwego, which was destroyed in November, 1894, where was cotton delivered to your line for transportation? A. Well, we had cotton delivered to us at the different railway terminals and at our own wharf.

"Q. Where were the terminals at which cotton was delivered to you? A. There was the Illinois Central terminal at Southport. I think at that time we used the Southern Pacific at Gretna, and I suppose the Texas & Pacific at Westwego, also.

"Q. I am speaking of the time prior to the erection of this dock. A. I presume the Texas & Pacific was then delivered to us at our own wharf. But are you not wrong about the date of the erection of the Westwego wharf? I don't think I know exactly the date, but prior to that time I think the cotton would be delivered to us on the city front at our wharf.

"Q. After the erection of this dock at Westwego, where was cotton delivered to you for transportation by the Texas & Pacific Railroad? A. At Westwego, as a rule. I could not state how much cotton was delivered to us at Westwego. I could not give you the exact quantity."

On Cross-examination:

"Q. Now, after Westwego was opened, then cotton shipped in that way was shipped to Westwego and

there received by the steamship lines, was it not? A. As a rule, with the modification that I have already mentioned, that a certain quantity or number of bales must be there at one time for delivery.

"Q. Was that ever embodied in any agreement with the railroad or was it simply a general statement by the steamship lines that it would not pay them to go there for less than about 2,000 bales? A. I think that, so far as my line is concerned, my understanding is that it was probably in writing. I won't be positive about that. I won't say that positively. I am not positive about the agreement being in writing, but I should be inclined to think now that it was, but I think that after the erection of the wharf at Westwego all the cotton was loaded there—that is, all export cotton—so far as our lines was concerned.

"Q. That is, the delivery of export cotton in the city of New Orleans along the front had about practically ceased? A. Yes, sir. * * *

"Q. And the railway part of the line was usually described as from the point of shipment to New Orleans, was it not? A. Yes, sir.

"Q. And the ocean or steamship line was New Orleans to Liverpool, or whatever the port the cotton was destined for? A. Yes, sir.

"Q. And the point of delivery from the railway company to the steamship line under that class of bills of lading was always understood to be Westwego, was it not? A. Yes, sir; under the modification I have expressed.

"Q. And that even where the bookings did not express that the port of delivery was Westwego? A. Yes, sir" (Record, pp. 67, 68, 70, 71).

There is no testimony in the case contradicting the testimony of these steamship agents of long experience that not only had Westwego become the recognized point of delivery by the railroad company to the steamship companies of all export cotton after the erection of the dock, but that this was simply consonant to a universal custom of all the railway companies centering at that port, which had obtained for a

long series of years and had become the established method and practice of handling export cotton at that port. The testimony of the other witnesses called by the plaintiff in error—Woods, Fallon and Westfeldt—in no way affects the foregoing testimony of the Steamship Agents. They were in different lines of business, and knew nothing of Westwego save as it related to their own lines of trade. The case, therefore, as made by the testimony, falls exactly within the principle of the Devato Case cited in the brief of the plaintiff in error. The facts of the case are also exactly in accordance with the facts in the Devato case when we compare the language of Section 2568, establishing the collection district of New Orleans, with the language, referred to in the Devato Case, of Section 2535, establishing the district of the City of New York. Section 2568 is as follows:

"There shall be in the State of Louisiana two collection districts, as follows:

FIRST. The district of New Orleans; to comprise all the waters and shores of the State of Louisiana east of and including the northern portion of the Atchafalaya River down to a point due west from the northern boundary of the town of Plaquemine, in the parish of Iberville, and east of the Bayou Lafourche, and all the waters and shores of the Mississippi River, and of the rivers which empty into it, or any of its branches, except the waters and shores within the State of Mississippi, and except the west bank of the Mississippi River between the towns of Plaquemine, in the parish of Iberville, and Donaldsonville, in the parish of Ascension; in which New Orleans shall be the port of entry, to include the parish of Orleans, and that portion of the parish of Jefferson lying between the Mississippi River and Lake Pontchartrain, and between the upper line of the parish of Orleans, left bank, and a line running parallel thereto, commencing at the Mississipp River, at the upper line of the city of Car-

rollton, and extending to Lake Pontchartrain; and the ports of delivery shall be as follows:

Bayou Staint John; Pontchartrain, on Lake Pontchartrain; Pittsburgh, in Pennsylvania; Wheeling, in West Virginia; Cincinnati, in Ohio; Louisville, in Kentucky; Saint Louis, in Missouri; Nashville, in Tennessee; Memphis, in Tennessee; Evansville, in Indiana; New Albany, in Indiana; Burlington, in Iowa; Galena, in Illinois; Alton, in Illinois; Quincy, in Illinois; Lakeport, to include the lake terminus of the new canal; Madison, in Indiana; Paducah, in Kentucky; Jeffersonville, in Indiana; Cairo, in Illinois; Keokuk, in Iowa; Dubuque, in Iowa; Parkersburg, in West Virginia; Leavenworth, in Kansas; Omaha, in Nebraska; Kansas City, in Missouri; Saint Joseph, in Missouri; Shreveport; La Crosse, in Wisconsin."

The language designating the district of the City of of New York, considered by Judge BROWN in deciding the Devato Case, is as follows:

"Section 2535 * * *

"SECOND. The district of the city of New York; to comprise all the waters and shores of the State of New York, and of the counties of Hudson and Bergen in the State of New Jersey, not included in other districts; in which New York shall be the port of entry, and New Windsor, Newburgh, Poughkeepsie, Esopus, Kinderhook, Albany, Hudson, Troy, Rhinebeck Landing, Cold Spring and Port Jefferson ports of delivery; and Jersey City a port of entry and delivery with an assistant collector to act under the collector at New York."

From this description, it will be seen that Westwego, was within the collection district of New Orleans, but was not within the designated limits of the port of entry of New Orleans, as Brooklyn was not within the designated limits of the port of entry of New York.

We beg to call attention to the discussion of this question of deviation in the brief in the Reiss Case, where the same question is involved and presented

upon the record in that case, and to the following authorities cited and discussed there:

Devato vs. 823 Barrels of Plumbago (D. C.), 20 Fed. Rep., 510.

Sailing Ship Gorston Co. vs. Hickie, 15 Q. B. Div., 580.

Price vs. Livingston, 9 Q. B. Div., 679.

Loomis vs. The Wabash, St. Louis & Pacific Railway Company (17 Missouri Appeals, 340).

Harrower vs. Hutchinson, 38 L. J. (Q. B.), 185.

Hostetter vs. Park, 137 U. S., 30.

We do not here repeat the discussion of the foregoing authorities here, but submit that they clearly establish the proposition that the word "port" as used in bills of lading must be understood in its commercial sense, and as such it was used in this bill of lading with reference to the universal usage and custom of the railway companies, to deliver all export cotton to the steamship lines at New Orleans, at their terminals. No authority to the contrary of this is cited in the brief of the plaintiff in error. The Devato case, when examined, sustains our contention in all essentials. "Westwego" was included in the term "port of New Orleans" used in the bill of lading in this case. The carriage of the cotton there was in accordance with the contract with the shipper and was a full compliance with the contract by the Texas and Pacific Railway Company, and in no sense was it a deviation from the terms of the contract of shipment.

IV.

In the discussion of the question of negligence of the railroad company, it is further stated in the brief that it was clearly negligent for the defendant railway company to receive and carry this cotton to Westwego, notwithstanding the accumulation of cotton at that point. The language of the brief is as follows:

"Notwithstanding this accumulation of cotton, the defendant received this cotton at Greenville, Texas, intending to take it to Westwego. The bill of lading is dated October 29" (Brief, p. 28).

Several authorities are cited under this proposition and evidently it is much relied upon, with other matters, to establish the negligence of the defendant. The falsity of the statement is shown at once by an examination of the bill of lading, by which it appears that this shipment was made at Greenville, Texas, a station on the Sherman, Shreveport and Southern Railway (Record, p. 169). The way-bills offered also indicate that the Texas and Pacific Railway Company was a mere intermediate carrier (Record, pp. 189, 190).

The cases which are cited (brief, pp. 27, 28), to the effect that it is negligence on the part of a carrier to receive goods, knowing that delays are bound to occur by reason of accumulation of freight on its line, have no application to this case, and an examination of the cases cited in the brief under this head will show that they are peculiarly inapplicable, because not only did the carrier which received the cotton involved in those cases delay it a long time in the course of its carriage, but kept it awaiting further carriage in a peculiarly

dangerous location, and upon this latter ground the carrier was ultimately held liable.

The case of Deming vs. Norfolk and Western R. R. Co. (21 Fed. Rep., 25) is in point upon the question in the case at bar, and not the authorities cited in the brief of the plaintiff in error. The facts in the Deming Case are entirely similar to the facts in the case at bar, while the facts in the cases cited in support of the proposition of the brief of the plaintiff in error are entirely different, and the cases, therefore, should not influence the decision of this case in this particular.

V.

For the foregoing reasons, and for the reasons stated in our main brief, the judgments of the Circuit Court and of the Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

RUSH TAGGART,

ARTHUR H. MASTEN,

Of Counsel for Defendant in Error

Supreme Court of the United States.

No. 86.—October Term, 1901.

Louis Auguste Marande et al., Plaintiffs in Error,
vs.
The Texas & Pacific Railway Company.

In error to the United States Circuit Court of Appeals for the Second Circuit.

[February 24, 1902.]

This action was commenced to recover from the Texas and Pacific Railway Company the value of sixty-five bales of cotton destroyed by fire on the night of the 12th of November, 1894, whilst the cotton was in the cars of the railway company standing on its tracks in the rear of or in close proximity to a terminal wharf of the corporation situated opposite the upper portion of the city of New Orleans, on the west bank of the Mississippi River, at a point called Westwego. The cotton formed part of one hundred bales shipped from Greenville, Texas, on the 29th of October, 1894. An export bill of lading was give by the Sherman, Shreveport and Southern Railway Company, that company purporting to act not only on its own but also on behalf of the Texas and Pacific Railway, and of the Elder Dempster & Co. steamship lines. The bill of lading provided for the carriage of the cotton from the point of shipment "to the port of New Orleans," and thence by the steamship line to Havre, France, and contained numerous conditions and exceptions, one of which exempted the carrier from all loss occasioned by fire. Responsibility of the railway company for the value of the cotton destroyed by fire, although at the time of its destruction it was in the possession of the railway under the bill of lading, was based on the assumption, first, that the fire was due to the negligence of the corporation; and, second, that the carriage of the cotton to the terminal wharf at Westwego, for transhipment there to the steamship line, was a deviation, and hence the railway company was not entitled to avail itself of the exception against loss by fire.

Upon issue joined, a trial was had in the Circuit Court. After the plaintiffs had introduced their testimony and rested their case, the defendant requested the court to take the case from the jury by giving a peremptory instruction in its favor. This was asked on the ground that there was no proof sufficient to go to the jury either as to the alleged negligence or the asserted deviation. The court granted the request, and exceptions were duly saved by the plaintiffs. From the judgment entered on the verdict the plaintiffs prosecuted error to the Circuit Court of Appeals for the Second Circuit, and in that court the judgment was affirmed.

The case being one depending not solely on diverse citizenship, the defendant corporation being chartered by an act of Congress, the plaintiffs prosecuted error to this court.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

Questions involving the liability of the defendant for damage occasioned by the loss of other cotton by the fire which destroyed the cotton, the value of which is now sought to be recovered, have been previously decided by this court. (*Texas & Pacific Railway Co.* v. *Clayton*, 173 U. S. 348; *Same* v. *Reiss et al.*, 183 U. S. ——; and *Same* v. *Callender*, 183 U. S. ——.) Whilst in deciding these cases it was essential to refer to and in some respects consider the course of business at the terminal wharf at Westwego, the controversy which here arises for decision involves different considerations, and causes it to be necessary to more fully refer to the establishment of the wharf at Westwego and the course of business at that place prior to and at the time the fire occurred.

In the Circuit Court of Appeals there were a number of assignments of error; now, however, only four of such assignments are pressed: the first, the twelfth, the thirteenth and the fourteenth. As the first of these only complains generally that the Circuit Court of Appeals erred in affirming the judgment, and the fourteenth is a mere reiteration of the first, the only assignments which we are called upon to consider are the twelfth and the thirteenth. The one asserts that the case should have been allowed to go to the jury on the issue of deviation, the other that error was moreover committed in not permitting the plaintiff to go to the jury on the general question of the loss of the cotton by the negligence of the defendant railway.

In order to pass upon the issues arising on these assignments, the evidence must be considered. In taking it into view, however, we shall do so only to the extent necessary to enable us to decide the question of law which arises, that is, was the evidence sufficient on the subject of negligence and deviation to go to the jury?

Approaching the city of New Orleans, on the opposite or right descending bank of the Mississippi River, the track of the Texas and Pacific Railroad terminated prior to 1873 at a point called Gouldsboro. There the company had a railway yard, roundhouse, and other structures. It there also had a terminal wharf with an incline, by means of which its cars could be transferred directly across the river by boat to a depot and yard belonging to the company situated at the foot of Thalia street, at about the center of the river front of the city of New Orleans. At the Thalia street depot freight for New Orleans was delivered, and that intended for further transit by way of export or otherwise was also deliv-

ered in carload lots over connecting tracks, or, where this could not be done, was hauled and delivered at the expense of the railway to the steamship or other carrier. Prior to 1873 the proof tended to show, at a point some six or eight miles above Gouldsboro, a spur track left the main track of the Texas and Pacific road, and extended for about half a mile in length to Westwego on the bank of the river. Before 1873, however, the proof showed that none of the inbound traffic was carried on at Westwego, though at that point probably some outbound freight, intended for the purposes of the railroad, may have been received at Westwego. Some time in 1873 the company constructed a grain elevator at Westwego, and built a terminal wharf at the same point. The proof gives no description of the elevator wharf, except that it was below the freight wharf and connected with it, but the freight wharf is fully described, there being no material variation in the testimony on the subject.

The wharf was built on the bank of the river. It was constructed on piles and stood above the water, the piling having placed on it beams and joists upon which planks were nailed, constituting a flooring which had very narrow spaces between the planks, as they were not tongued and grooved. The wharf was about 800 feet, stretching up and down the river front, and was somewhere between 350 to 400 feet in depth, that is, running back from the river front to where it rested against the bank. On this wharf were constructed two freight sheds, the one designated as No. 1 began same short distance above the lower end of the wharf, and extended up for a length of between 250 to 300 feet. At a short distance, above the upper end of this shed, the flooring on the wharf ceased, and there was an open space about 50 feet, extending up the wharf, and which was near about the width of the shed; in this place the piling had been driven and the joists and beams placed, but no flooring was laid. Beyond this open space there was built shed known as No. 2, of the same dimensions as the lower one. Both of these sheds were wooden structures raised on posts placed in the wharf, entirely open at each end and at each side. The roof commenced at about 20 feet above the flooring of the wharf, and was surmounted by a cupola running the entire length of each shed, which was covered with a lattice or wooden work like a wooden shutter. The number of the rows of posts in each shed is not made clear in the proof, but it tended to show that the posts were somewhere between 20 and 30 feet apart. About 8 to 10 feet in front of both of these sheds along the wharf was a railroad track, which entered the wharf from the lower end, and extended to and beyond the extreme upper end of shed No. 2. Between the outer rail of this track and the river front there was a space on the wharf of about 30 feet. Behind the sheds were two railroad tracks running the entire length, and extending above the upper end of No. 2 shed, somewhere between 50 and 100 feet.

Westwego was not within either the municipal limits of the city of New Orleans, or the limits of the port of New Orleans, as defined by statute. It was shown that the season of active cotton receipts in the city of New Orleans commences about the first of September and ends about May of each year, and that the Westwego wharf was completed in time to enable the railway company to avail of its facilities for, if not the whole, at least a portion of the business of the cotton season of 1893 and 1894. After the construction of the wharf in the season in question the great bulk of cotton handled by the Texas and Pacific Railroad under export bills of landing was deflected from its main track at the Westwego spur track, carried to the terminal wharf, and there unloaded and transhipped. This the proof showed was the course of business also as to all export cotton in the following season of 1894 and 1895, up to the time of the fire, except, perhaps, as to small lots of cotton intended for export, where the number of bales would not justify the coming of a steamer to the wharf at Westwego, in which case the cotton was carried to Gouldsboro, transferred, and delivered. In arranging to carry export cotton the course of business was this: The Texas Pacific Railway would contract with steamship lines for the carrying of a given quantity of cotton at a stated price, and under these contracts would then, through either itself or through other carriers at various points of original shipment, issue through bills of lading, embracing both railroad and water carriage. The method pursued by the railway to bring about the formal delivery to the steamship lines of the export cotton at the Westwego wharf after its arrival is fully stated in the case of *Texas & Pacific Railway* v. *Clayton*, *supra*. It was shown that under the contracts made by the railway with the steamship companies there was always an understanding that the ships would not be obliged to suffer the expense of moving from their own docks, usually in the city of New Orleans, to the Westwego wharf, for the purpose of loading cotton, unless a sufficient amount, variously stated at from 1,000 to 2,500 bales, was on hand for delivery.

It appears that other railroads possessed terminal wharfs on the river, some of them being outside of the municipal and port limits, and that they were used as a depot for the shipment of through billed export cotton, under methods of business substantially similar to those at Westwego. The export cotton intended for transhipment at the Westwego wharf was thus handled: On arriving in the vicinity, the cars were usually, in the night time, switched to the tracks running in the rear of the wharf beside the open sheds, and the cotton would then be unloaded and stored in the sheds, whence, when called for, it was delivered to the steamships. The track running the length of the wharf in front of the sheds was principally used for the bringing in of freight intended for

shipment by water other than cotton. The cars containing it would be drawn or pushed by a locomotive along the track, and the freight would then be moved from the cars to the vessels.

During the cotton season of 1894 and 1895 (prior to November the 12th, 1894) labor troubles of a serious character occurred at the docks in the city of New Orleans. The disturbances, the proof tends to show, caused delay in the movement from the port of New Orleans of export cotton. Either because of this fact or because of an unusually large cotton crop, or an unexpectedly rapid movement of cotton to the seaboard by the Texas and Pacific lines, large quantities of export cotton accumulated in the sheds on the wharf at Westwego. The cotton, which was all compressed, was stored in the following manner: The bales were piled between 15 and 20 feet high throughout the whole space of the shed, but probably three, and certainly not more than four, narrow gangways being left in each shed, running from front to rear. There was no possible doubt from the evidence that no gangways were left running lengthwise of the sheds. There was also proof tending to show that these narrow gangways, as the cotton accumulated, were obstructed by bales of cotton standing endwise. The proof also tended to show that the accumulation of cotton became so great that on the river front of the sheds, in the open space towards the railroad track, cotton was also placed, approaching so close to the railroad track that as an engine moved along carrying or pushing cars containing freight intended for shipment there was not sufficient space between the cotton and the track to enable a person to stand with perfect safety. It appeared that around the open space between the upper end of the No. 1 and the lower end of the No. 2 shed cotton had been also piled. It was shown that most, if not all, of the cotton exposed as stated was not covered with tarpaulins, and no other means were resorted to to protect it from the danger of fire arising from the operation of the locomotives in the rear and front of the sheds and among the cotton on the wharf.

Westwego was remote from any town or village having a police force or a fire department. The wharf exclusively belonged to the railway company, and was under its control; property on it, therefore, had the benefit of no police protection except that afforded by the company, and in case of fire had nothing to rely upon except the men and appliances which the company furnished. The fire appliances were as follows: There was a tank near the grain elevator standing at such a height as to afford adequate pressure. This tank was supplied by a pump drawing its water from the river. From the tank a pipe ran to the wharf and passed under the floor of each of the sheds. In each shed there were three hydrants or water pipes, in the middle of the shed—about equidistant; they were by the side of the posts, and stood six feet above the floor. On each of

the six posts by which the hydrants stood and connected to them there was a platform six or more feet above the floor, on which was placed a hundred feet of coiled hose. A witness testified that some months or more before the fire he had seen hose stretched along the front posts of the shed resting on pieces nailed to such posts, but there was other testimony tending to give rise to the reasonable inference that no such hose was there at the time of the fire. The testimony on this subject, however, had no relation to the hose coiled on the platforms on or around the posts where the hydrants were situated. This is conclusively the case, since the witness who testified as to hose being stretched as above stated spoke only of the front, and said he had not observed the hydrants and their condition, and knew nothing of them. We say this in passing, because in the argument for the defendant in error it is suggested that the testimony of the witness in question related to the hose at the hydrants, and was all the testimony on the subject in the record, overlooking the clear and cumulative testimony that the hose, at the hydrants, was connected with them and coiled on a platform on or around the posts about six feet above the floor. The evidence left it uncertain exactly where the valve was placed which opened the connection with the water. The proof tended to show that the valve was either under the floor with an opening to reach it, or just above it, at the base of the hydrant pipe. As the three hydrant pipes in each shed stood beside the posts, and the gangways running from front to rear, although very narrow, were shown not to be obstructed by the posts, it was therefore inferable from the proof that the posts where the hydrant pipes stood had cotton piled around them. Indeed, this inference was sustained by direct evidence tending to show that the posts near which the hydrants stood had cotton piled around them from twelve to fifteen feet high, and there was also proof tending to show that in some instances the cotton so piled had fallen over on the hose on the platform, and the bale which did so had to be removed.

There was testimony tending to show that along the front and rear of the sheds there were barrels containing water with buckets hanging near. It was shown without contradiction that there were no chemical fire engines, although there was testimony tending to show that what were designated as chemical fire buckets had been bought at about the time the wharf was built, and there was conflict in the testimony as to whether these buckets were on hand for use at the time of the fire. The evidence tended to show that no general directions as to handling or the use of the hose in case of fire had been given, that no fire drill had ever taken place, nor had the men in charge of the wharf been ever instructed in any way as to the use of the apparatus which has just been described.

The wharf in the day time was under the direct authority of an employe designated as chief clerk; in the night time it was in the charge of

one regular employe of the company and three watchmen, who were the members of a special private police force in the city of New Orleans, the railway company contracting with the head of the special police organization for the services of the three men at the wharf, and a like number of men were on watch during the day time. In other words, in the night time the wharf was in charge of but four men, one a regular employe of the company, and three special policemen employed as just stated, and their duty extended over the whole surface of the wharf and sheds, as well as under the wharf.

A short while prior to November 12, growing out of supposed danger resulting from fear of election disturbances, the force at the wharf was increased by a few men, whose duty it was to patrol the space under the wharf and prevent persons from entering by boats or otherwise. This force, prior to the fire, had been reduced to the number previously stated.

It was shown that at a wharf in the city of New Orleans belonging to a steamship company where cotton had accumulated, the force of watchmen employed was largely in excess of the number at Westwego, and that at a terminal wharf of another railroad, where there was about half the quantity of cotton which was on the wharf at Westwego at the time of the fire, there were twenty-five watchmen employed instead of four, the number at Westwego; that there were Babcock fire extinguishers, hose placed on reels ready for use, and that this hose was used almost daily for the purpose of washing down the wharves, and to enable the men in control to be familiar with its use in case of emergency.

By about the middle of October, 1894, the accumulation of cotton at the wharf of Westwego had been so great that the proof showed that the railroad officials had become solicitous on the subject, and deemed that they were in great risk of fire. It was also shown that about that date a destructive fire had occurred in a wharf where cotton was stored in the city of New Orleans, presumed to be the result of the labor disturbances, and that at Westwego, during the daytime, within a period not remote from the general conflagration which ensued, subsequently, the longshoremen working there had discovered a fire smouldering in a bale of compressed cotton which was in the tiers, and that it had been extinguished by throwing down the cotton and removing the bale; and that this fact had been reported to the officers of the company. Prior to Monday, the 12th of November, 1894, cars loaded with cotton were being brought in in the night time in the rear of the sheds, and for days prior to that date vessels had been loading in front of both of the sheds, some with cotton and some with other products. On the 12th of November two steamers were at the wharf; one about abreast of the lower end of No. 1 shed, and the other opposite the upper or No. 2 shed; that for the purpose of bringing in the cargo taken by these ships, a locomotive was operating among the cotton on the wharf in front of the shed, and was

passing back and forth on the track, pushing cars containing the freight to be loaded. Although there was some proof indicating that on that particular day the locomotive which entered from the lower end of the wharf proceeded up the track abreast of No. 2 shed, we assume, for the purposes of this opinion only, that it was shown that the locomotive was pushing so many cars ahead of her that she did not get abreast of the No. 2 shed. There was no proof that the locomotive, in operating along the front of the wharf, was emitting sparks from her smokestack or dropping cinders from her fire-box.

There was evidence as to the direction of the wind on the 12th of November. The parties asserting that opposing inferences were to be deduced therefrom, but without undertaking to consider this controversy, we assume only for the purpose of this opinion, that the result of this proof as to the direction of the wind tended alone to show that if a spark had been emitted from the locomotive operating on the front of the wharf, as above stated, the wind would have carried it away from the No. 2 shed, where the fire subsequently broke out, as we shall hereafter state.

On Monday, the 12th of November, 1894, the accumulation of cotton was so great that there were stored in the sheds and on the wharf in the manner which we have indicated, about 20,000 bales of compressed cotton, and there were in cars, standing on tracks in the vicinity of the wharf and sheds, about 8,000 bales more, awaiting storage room. The cotton sued for was among the latter. On the evening of the date above mentioned, shortly after the day force had ceased work and the four night watchmen had come on duty, the cotton was discovered to be on fire. The flames spread rapidly, and a disastrous conflagration followed, with the result that most of the cotton in the sheds and the sheds themselves, as well as cotton in the cars in the vicinity, among which was that sued for, was destroyed. What took place at the time of the discovery of the fire was testified to by only one witness, one of the night watchmen, Robeau, who was one of the three special officers of the private police agency. His statement of what occurred may be thus summarized: His place of duty was at the upper or No. 2 shed, and his business was to pass around and through the shed, and at designated intervals register his presence upon a watchman's clock. After sending a telephone message to indicate his presence at his post, and whilst he was on the river side of shed No. 2, at the lower end, he heard a cry of fire. Running immediately to a gangway, he crossed to the rear or wood side of the shed. Not seeing the fire, he ran up the rear side and across by a gangway to the river front, thence running along the river front of the shed he turned into another gangway and hastened towards the rear of the shed. In going through there he discovered Valle (the one of the four watchmen, who was the regular employe of the railroad company) standing on top of the piled cotton,

about fifteen feet from the floor. Robeau joined Valle, who had the nozzle of a hose in his hand, from which no water was being thrown. From the place where the two stood on the piled cotton they saw a fire burning near the floor in the direction of the upper end of the shed. As they stood upon the pile of cotton they were above the hydrant pipe running up by the post, and about six feet above the platform around or upon the post, upon which was coiled the hundred feet of hose connected with the hydrant. From where they stood both the hydrant pipe and the platform with the coiled hose on it were hidden from their view by the piled cotton. Valle, holding the nozzle of the hose in his hand, from which no water was flowing, called upon Robeau to get down between the piles of cotton and open the water valve. Robeau squeezed himself through the space between the cotton piled around the post to the floor, felt about for the valve, perceived water on the floor, declared the valve to be open, and rejoined Valle. They both dragged at the hose, but no water flowed. The burning cotton flamed up, Valle called upon Robeau to get down on the platform around the post and uncoil or untangle the hose. He refused on account of the intensity of the fire, and both became alarmed and ran away. The destruction of the property ensued.

As the only witness who testified concerning the outbreak of the fire, the alarm, and the efforts to extinguish it, was Robeau, and as therefore his testimony is of the utmost importance in determining whether the case should have been allowed to go to the jury, we excerpt in the margin * the portions of his testimony which are material.

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*Q. Now go on and state what occurred. A. After we had done telephoning, and saw everything was all right, we came to the office—I mean to the office of the shed No. 1—to take my lamp, and I went to my beat, and I met the one that was there, and I said "How is it?" He told me "All right." I took off my coat and put my lamp away. Then I came to make my rounds as usual, to see if everything was right, where my key was. About five or six minutes I was standing there, or seven minutes; I can't tell exactly. I saw the private watchman pass. In about a minute or two I heard "Fire! Fire!"

By the COURT:

Q. You heard the cry of fire? A. The crying of "Fire! Fire!" I run to the woods side to see if I could see anybody, but I could not see anybody, and then I run to the river side, and then I run to the fire and I passed through the shed to go to the woods side and I saw Valle with hose in his hand, and he says, "Go down and open the valve."

Q. What did you do? A. I went to open the valve. I could only go sideways. I couldn't hardly stand; and I found the valve wide open. Then I came back and tried to help Mr. Valle with the hose in his hand. Everything was in flames. I couldn't do anything. I tried all my might to have the water, but we could not have any water. The hose was too heavy; we couldn't do anything at all; and he says to me, "Robeau, go down and untangle the hose." I says, "I won't go down

Such being the proof, was it sufficient to go to the jury? is the question then for decision. In answering this question, as we have said at the outset, we shall be called to pass upon, not the preponderance of the evidence, but whether it was adequate to go to the jury; and this involves not a decision as to the facts, but the determination of a proposition of law.

In *Washington Gas Light Company* v. *Lansden*, (172 U. S. 534,) the question of the liability of the gas company for certain acts of its general manager, in respect to procuring the publication of a libel, was presented for determination. In the course of the opinion, after observing that in the case no specific authority was pretended to have been given to the general manager on the subject, the court said (p. 545):

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where the flame is." I kept up; that is the only thing I could do. I went to the other end of my beat, and took my coat and ran away.

Q. Where did you first see the light of the flame that night? A. I was about 70 feet from the light.

Q. When you saw Valle did you first see the light of the flame? A. I saw Valle first.

* * * * * * *

Q. And when you first saw Valle, where was he? A. On top of the cotton.

Q. Whereabouts? About 12 or 15 feet high on top of the cotton.

By the COURT:

Q. Whereabouts on the wharf? A. At the woods side.

By Mr. CLEVELAND:

Q. You were on the woods side? A. Yes, sir.

Q. Where was Valle? A. He was on the cotton.

Q. Whereabouts, with relation to the center of the shed? A. The fire?

Q. No; where was Valle? A. He was about the center of the shed, but the upper end; because the fire was about 70 or 75 feet below the upper end.

Q. When you first saw Valle what was he doing? A. He had the hose in his hand.

Q. What was he doing with it? A. He couldn't do nothing. When I went down there he told me to go down and open the valve; and so I went, and it was wide open.

Q. When you were down there trying this faucet, and found that it was wide open, did you see any water coming out? A. No, not a drop. We couldn't have any water.

Q. You did not see any water when you were opening the valve? A. Yes; saw the pouring.

Q. Leaking, you mean? A. Yes.

Q. When you clambered up with Valle, and he had the hose in his hand, what part of the hose did he have in his hand? A. The pipe.

Q. Was there any water coming out? A. No, sir.

Q. What was he doing when you got up on that pile of cotton? A. Tried to have water, but he could not have none.

Q. Was Valle on the hose? A. Yes, and I was too; but everything was in flames; we couldn't do nothing at all.

"We are then limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide."

The court then reviewed the evidence on this branch of the case, and concluded as follows (p. 548:)

"We are of opinion that the court erred in submitting to the jury the question whether Leetch, in respect to the subject of the letters written by him to Brown, had authority to bind the company. The court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence upon which to base a verdict against it."

Q. You say he said to you, "Go down and untangle that hose?" A. Yes, sir.

Q. How do you mean go down? Where was the hose? A. The hose was pretty near where the fire was, against the post.

Q. Against the post? A. Yes, sir.

Q. Was it on the platform? A. On the floor.

Q. On the floor of the platform? A. Yes.

Q. On the posts? How high up from the floor of the dock? A. The hose?

Q. Yes. A. The hose was about six feet high.

Q. What did you do when you got up with Valle? A. Tried to pull out the hose to have the water to extinguish the fire, but we could not. Everything was in flames.

Q. When did you first see the flames that night? Before you got up to Valle? A. When I got on top I saw the flames.

Q. How many bales of cotton were on fire then, as you recollect it? A. About three or four bales.

Q. No water came out of the hose? A. No, sir.

Q. How long were you there pulling that hose, trying to untangle it? A. Maybe two or three seconds, because we tried the best we could.

* * * * * * *

Q. Describe to the jury this fire? Where was it? Was it on the top of the cotton or at the bottom? A. At the bottom of the floor.

Q. How near did you come to the flames that night, when you were nearest to them? A. About fifteen paces.

Q. In your judgment, if you had had a sufficient stream of water——. A. We could easy put it out.

Q. Wait. In your judgment, if the water had come out of the hose that night—a full stream of water—such as the hose was able to carry, could you have extinguished the flames? A. Yes, sir; myself alone.

* * * * * * *

Cross-examination by Mr. TAGGART:

* * * * * * *

Q. Where were you on the wharf when you first heard this cry of fire? A. I was about 30 feet under the shed, at the lower end.

Q. Towards No. 1 shed? A. Yes.

In *Patton* v. *Texas & Pacific Railway Co.*, (179 U. S. 658,) the following facts appeared: The action was brought by Patton to recover damages for injuries sustained while in the employ of the railway company as a fireman. On a second trial a verdict was directed for the defendant, upon which judgment was rendered, and the Court of Appeals affirmed such judgment.

Answering the contention of the plaintiff in error that the trial court erred in directing a verdict and in failing to leave the question of negligence to the jury, the court said (p. 659):

"That there are times when it is proper for a court to direct a verdict is clear. 'It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendent, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. (*Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30, 32; *Griggs* v. *Huston*, 104 U. S. 553; *Randall* v. *Baltimore & Ohio Railroad*, 109

Q. On the river side? A. On the river side.

Q. That is out near the tug that was there? A. About 30 or 40 feet. I can't say exactly.

Q. Were you under the shed? A. Under the shed.

Q. Which way did you go when you heard the cry of fire? A. My idea first was to go to the woods side to see if I could see anybody.

Q. Were you at a gangway? A. Yes, sir.

Q. You went through that gangway then to the woods side? A. Yes, sir

Q. And you saw nothing? A. I saw nothing. Then I run to the river side.

Q. Did you come back through the same gangway? A. No, sir.

Q. You went up along the woods then? A. I went to the upper end of my beat after I heard the noise "Fire! Fire!"

Q. Did you go clear up to the upper end? A. Yes, sir.

Q. And you did not see any fire up there? A. No.

Q. Then where did you go? A. I went to the woods again. I went through the gangway, and I saw Valle.

Q. This hose he had in his hand, you say, did you? A. He had what?

Q. He had the hose pipe in his hand, did he? A. Yes, he had the pipe in his hand.

Q. How far was the hydrant from where he was? A. About 10 feet; but where he was he could not see the hydrant.

Q. He could not see the hydrant? A. He was on top of the cotton. He could not see me when I went down neither.

Q. What did you do when you went there? A. I went there and I saw the valve was wide open.

Q. The what? A. The valve of the pipe.

Q. And was there water in the hose? A. Kind of water; yes, in the hose.

Q. It had pushed out in the hose, had it? A. Yes, swelled up.

Q. How far had it pushed out and swelled up in the hose? A. I didn't look. As soon as I saw it open I went to Valle to help him.

U. S. 478, 482; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241; *Schofield* v. *Chicago & St. Paul Railway Co.*, 114 U. S. 615, 618; *Delaware &c. Railroad* v. *Converse*, 139 U. S. 469, 472. See also *Aerkfetz* v. *Humphreys*, 145 U. S. 418; *Elliott* v. *Chicago, Milwaukee &c. Railway*, 150 U. S. 245.)"

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. (*Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43.)"

We come, then, to an analysis of the evidence for the purpose of ascertaining whether it was correctly decided that it afforded no reasonable ground upon which a jury, in the exercise of its functions, could have inferred that the destruction of the cotton by fire was occasioned by the negligence of the defendant. In doing so we shall, of course, be mindful, as was said in *Patton* v. *Texas and Pacific Railway Company, supra*, that as both courts below have held that the evidence had not the tendency stated, their decision is entitled to great respect—a respect, however, which

Q. What did you do to help him? A. We tried to pull the hose free, and we couldn't do anything.

Q. The pressure of water had kinked the hose? A. Yes, the hose was so tangled that we couldn't do anything. At the same time the blaze was going; and Valle says to me, "Go down and have it untangled." And I said, "No, I won't go, go yourself if you want to."

Q. And you run away then, did you? A. Yes, I did. I tried to save my skin.

Q. This cotton was blazing? A. Yes, very high.

Q. Blazing right up? A. Yes.

Q. Blazing way up? A. Yes.

Q. How high was it blazing when you got there? A. About 6 feet from the floor—about.

Q. How high was the pile of cotton? A. The cotton was piled about 15 feet high.

Q. Was it blazing along the side of that pile of cotton? A. Yes, spread out.

Q. Spread out along the ends of the bales, was it? A. Yes.

Q. Where was this kink in the hose—down below Valle? A. Where the platform was?

Q. Yes. A. About 6 feet under.

Q. You say the valve, when you tried it, was wide open? A. Yes, sir.

Q. How far out in this hose had the water pushed out from the pipe? A. I don't know that.

Q. Did you take hold of the hose to see? A. With all my might, all the strength I had.

Q. And the pressure of water was so heavy that you could not straighten it out? A. We couldn't budge it,

Q. Do you know who opened that valve? A. I don't know.

Q. Do you know how high the fire was when that valve was opened? A. Yes.

Q. How high was it when the valve was opened—when it was first opened?

The COURT: He found it open.

cannot relieve us from the duty of securing the plaintiffs in the enjoyment of their constitutional right to trial by jury if, in our opinion, the case made by them was one proper to be decided as one of fact by the jury, and not to be concluded as a matter of law by the court.

All the reasonable tendencies of the proof, if any, to show negligence, must arise from three propositions, which we shall proceed to consider in their order.

First. The manner in which the cotton was stored and the operation of the locomotives in and about the same so as to subject the cotton to danger of fire and to cause the prompt detection of a fire to be so difficult as to render it practically impossible in time to prevent a conflagration.

The WITNESS: I found it open when I got there.

Q. You don't know who opened it? A. No, I don't know who opened it.

Q. How long were you there with Valle when you discovered this fire? A. I never took my watch for that. I did the best I could.

Q. About how long were you there? A. Maybe two or three seconds; I don't know.

Q. And then where did you go? A. I went up stairs to help him.

Q. You went up on the cotton? A. On the cotton.

Q. How long were you there with him? A. Maybe one or two seconds.

Q. Then where did you go? A. I said I tried to save myself.

Q. In saving yourself, where did you go? A. I went to the lower end of my beat and took my overcoat and ran away. I didn't stay any more.

* * * * * * *

Q. No, how long was it before the fire was spread all over the No. 2 shed? A. About ten minutes.

Q. And about two seconds after you got there you had to run away on account of the fire, didn't you? A. Yes.

Q. Do you know where the fire started? A. Right in the center of the shed; I mean up the shed, about 40 or 50 feet this side.

Q. About 40 or 50 feet south of the upper end of No. 2 shed? A. I can't say exactly. About 70 feet, maybe. I don't know.

Q. About that far from the upper end of No. 2 shed? A. Yes, sir.

Q. And in the center of the shed, wasn't it? A. Yes, sir,

Q. And near the bottom of a pile of cotton, wasn't it? A. What?

Q. Was it near the bottom of the pile that it was burning? A. At the floor, I told you, where it started.

Q. Was there a whole pile of cotton on fire? A. When I got there I saw the light of the fire.

Q. Where did you see the light from? Where were you when you saw the light of the fire? A. Didn't I tell you that?

A. No, you have not. A. Didn't I tell you I was about 70 feet from the light of the fire?

Q. Was it in a gangway that the fire was? A. Yes, sir.

Q. Were you at the end of the gangway when you saw the light? A. I was on the platform outside.

That the storage of such a great mass of cotton in the open sheds and on the wharf, with only a few narrow gangways from front to rear, with no passageways between the tiers running lengthwise of the sheds, so as to enable the cotton to be inspected and to be accessible upon an alarm of fire, with substantially no tarpaulins or other covering, and the operation of the locomotives in and around the open sheds and in front of the wharf among the cotton so situated at least afforded sufficient proof to go to the jury, we think is too clear for discussion. This was not controverted by either the trial court or the Circuit Court of Appeals, but the proposition which those courts felt constrained to uphold was, that as the proof did not in their opinion furnish any reasonable ground

Q. And did you see the light down the gangway? A. Yes, sir.

Q. How much of a fire was there then, when you saw that? A. I couldn't tell you.

Q. You did not see the fire? A. Yes; when I came to climb up on the cotton, Valle says to me: "Go down and open the valve."

Q. I didn't ask that. I asked how much of a fire there was? A. I don't know.

Q. You did not see the fire? A. I saw the light of the fire.

Q. How much light was there: was it a big light? A. How much light was there?

Q. Yes; how much light did you see? A. I can't say exactly how much light I saw.

Q. Did you see it over the piles of cotton? A. No, sir; we couldn't see it.

Q. You could not see it over the piles of cotton? A. Because I passed there, about 15 paces from the places in the gangway.

Q. When? A. To come to Valle.

Q. And you did not see it in the other gangway, then, did you? A. No, of course not.

Q. You say this blaze was about 6 feet high when you got there? A. 6 or 7 feet high, yes.

Q. And how many bales of cotton was it covering? A. I don't know. I saw the light of the fire.

Q. I know, but when you got there?

The COURT: When you got there to Valle?

A. Three or four bales.

Q. Had it burned the covering off the bales? A. They were spread out.

Q. How wide was the fire; how wide was the blaze? A. About 15 or 20 feet I should say.

Q. Was it on the end of a solid bale of cotton? Was the pile of cotton solid there that it was burning against? Do you understand that? A. What do you mean?

Q. Was this cotton piled? A. Yes, like that.

Q. And was it burning 15 feet high? A. Yes, spreading.

Q. Spreading rapidly? A. Yes.

Q. How long was it from the time you heard Valle cry "fire" until you got to Valle? A. Maybe half a minute. I don't believe it was.

from which it could be inferred that the acts above enumerated had actually tended to produce the fire, therefore, even although there was negligence in the matters suggested, they furnished no reasonable ground upon which the jury could have given a verdict for the plaintiffs. This reasoning proceeded upon three assumptions, *a*, because the proof did not show that the locomotive operating along the front of the wharf, on the morning of the 12th of November, had traversed the track opposite to or in the immediate vicinity of the place in No. 2 shed, where the fire occurred; *b*, because there was no proof that the locomotive was emitting sparks or dropping fire from its firebox, and if there had been, because the proof as to the direction of the wind showed that such sparks, if emitted, would have been blown away from the direction of the upper part of No. 2 shed where the fire broke out; and, *c*, because the fire was immediately discovered on its outbreak.

But each of these propositions either rest on premises of fact where no proof whatever existed or disregarded what the jury would have had the right to conclude was the reasonable tendency of the proof as made. There was no question that the proof showed, leaving aside the movement of the engine on the wharf on the morning of the 12th of November, that other locomotives had been moving in the rear of the wharf and in its vicinity probably on the night of the 11th, and certainly on the 10th, and previously; and the proof also unquestionably showed that for days prior to the breaking out of the fire, except it may be Sunday, vessels had been loading at the wharf in front of the No. 2 shed, and the tendency of the proof was to show that the cargo which they took was carried on the wharf in front of the shed by locomotives. To hold then that there was no proof tending to show that the conflagration was the result of the movement of locomotives about and among the piles of exposed cotton, was simply to say such must have been the case because the proof did not tend to show that the fire could have been caused by the locomotive which was on the wharf on the morning of the 12th. This, however, was only to find, in the absence of all proof as to any other origin of the fire, that it would have been unreasonable for the jury to deduce the conclusion that the fire was the result of other and previous proximity of the locomotives to the cotton. The obvious danger resulting from the use of the locomotives, as described, in and about so easily ignitable a material as cotton, particularly when stored and unprotected as this was, is to our mind so clear that we think the least that can be said is, when the origin of the fire was otherwise unexplained, that the jury would have been reasonably justified in drawing the inference that the use of the locomotives caused the fire. And the general course of legislation, both in England and this country, demonstrates the soundness of this conclusion. (*St. Louis & San Francisco Railroad* v. *Matthews*, 165 U. S. 1.) The only possible ground by which this can be met is the assumption that because there was no

proof tending to show the operation of a locomotive in the rear of the sheds or on the front of No. 2 shed, for a considerable period of time before the fire, therefore sparks from the locomotives could not have caused the fire, because if they had the conflagration would have broken out sooner. But this assumes that compressed cotton, piled up as this was, if ignited by sparks, would necessarily at once break out into flame, and disregards the right to have the judgment of the jury as to whether the fiber of such cotton, when so situated, on being touched by a spark, might not have smouldered for a considerable time, until such headway had been gained as to cause the fire to break into flame. In other words, there being two inferences to be drawn from the testimony, one of a sudden outbreak of the fire and the other of a long continued smouldering, it was the province of the jury to pass upon the question. And this disposes of the assumption that the fire was discovered immediately on its breaking out. Such assumption, however, was a mere unreasonable inference from the facts in favor of the defendant and against the plaintiff, and rested on the predicate that there was nothing in the proof which would have justified a jury, although the cotton was compressed and piled up, in inferring that the fire might have smouldered for a considerable time before bursting into flame. It was certainly open to the plaintiff to direct the attention of the jury to the obvious natural law that any fibrous material, like cotton, when tightly compressed and piled, as was the cotton in question, if ignited by a spark, may smoulder for an uncertain period. The only proof on the subject of the discovery of the fire is that to which we have referred, giving an account of the alarm of fire by Valle. The mere fact, however, that he gave an alarm of fire when he discovered it does not support the inference that the fire had not been burning for a considerable period before he knew of it. Indeed, when the state of the fire, as described by the witness Robeau when he first saw it, is taken into consideration, and the natural tendency of a tightly compressed fiber to smoulder is borne in mind, the jury might have reasonably inferred, we think, from the condition of the fire when first seen by Robeau and the rapid and extensive conflagration which almost immediately resulted, that the discovery marked, not the time when the ignition of the cotton took place, but the breaking out of the cotton into a flame as a consequence of its prior burning. This also disposes of the view that although the cotton was negligently stored by leaving no gangways through the length of it, by which it could be inspected and the presence of fire be promptly detected, the proof did not tend to justify a recovery because the fire was discovered in the mass of cotton just as soon as it would have been if proper precautions had been taken in its storage. The description of the state, of the fire we think, afforded ground for a jury to otherwise find, for the only proof on the subject was, that in order to discover the fire,

the watchmen had to climb up on the pile of cotton, and that it was not possible, from the gangway, to have seen the fire, as it would have been if suitable openings lengthwise had been left.

Second. That the proof showed negligence in the care of the property inasmuch as the number of watchmen who were engaged were greatly inadequate for the service, and therefore the jury would have been reasonably justified in finding that the destruction of the cotton was occasioned thereby.

Here also we think it was evident that the presence of only four watchmen to care for so vast an accumulation of cotton stored and exposed to the risks it was subjected to was sufficient to go to the jury on the question of negligence. Both the courts below with reference to this ground substantially concluded, as they did as to the former one, that even although the number of watchmen was insufficient, nevertheless as the inadequate number of watchmen, discovered the fire as soon as it broke out, a greater number of watchmen could have done no more, therefore the inference of negligence contributing to the loss was as a matter of law unwarranted. This, however, but rested on the assumption that the fire was immediately discovered. On the contrary, as we have said, not only the reasonable inference that cotton stored and piled like that here in question, when ignited, would smoulder, but the actual facts as to the conflagration in hand, we think, were sufficient to go to the jury so as to enable the jury to conclude whether, if an adequate force of watchmen had been on hand, the fire might have been sooner detected and the property saved from destruction. But the larger number of watchmen would have been efficient, not only in detecting the fire, but for the purpose, in such an emergency, of handling the cotton in order that the fire might be gotten at and extinguished. That an adequate force might have so done was reasonable to infer, especially in view of the proof that in the daylight, when a larger body of men were at work, smouldering cotton was discovered in one of the lower bales, and by removing the others and getting at the ignited bale in a tier, a conflagration was prevented.

Third. That the jury would have had reasonable ground to infer negligence from the inadequacy of the fire apparatus and from the want of instructions as to its use or competent men to handle it.

This proposition, we think, is also well founded. The argument to the contrary is, that as it was shown that if the apparatus which was there had been properly worked, the fire would have been extinguished; therefore there was no negligence in respect to such appliances. The proof was construed to be that when Robeau heard the alarm of fire and rushed to the point where Valle stood, upon the cotton, and was ordered by Valle to go down and open the valve, he found the valve open, because Valle had previously opened it. But we have searched the record in vain for any direct

proof that Valle had opened the valve before Robeau's arrival. *Non constat*, therefore, that the valve had not been left open negligently some time previously, as it was hid from view by the cotton, and if the open valve therefore caused the tangling of the hose or rendered it so that it could not be moved, the negligence in respect to the care of the hose would be that of the company. If it be that one inference from the testimony would have justified the conclusion that Valle had opened the valve, as such inference was not necessarily to be drawn, then it was the function of the jury and not of the court to draw the proper inference.

But this, it is argued, is of no consequence since, it is asserted, the proof showed that the cause of the destruction of the cotton was not the imperfect nature of the appliances, but an error of judgment in the use of them by the employes in the emergency of the moment. The proof, it is insisted, left no room for any other inference than that Valle on the discovery of the fire had rushed to the spot, thrown the hose down from the platform, got down among the cotton and opened the valve, or had left the hose on the platform without unwinding it, and that the pressure of water had either so kinked or tangled the hose when thrown down or rendered it so difficult to move it, if left coiled on the platform, that the water would not flow, and the failure to extinguish the fire resulted. But all the elements contained in these propositions involve mere inferences from the evidence which it was the province of the jury to make. The only testimony in the case showing the actual condition of the hose at the time of the discovery of the fire was that of Robeau. That testimony showed that the cotton was piled up around the post where the hydrant was situated, above the platform on which the hose was coiled, to such an extent that neither the hydrant nor the hose could be seen from the gangway or from the top of the pile of cotton, that to get at the hose, if it was on the platform, required either reaching to or getting on the platform about six feet below, between the cotton, and to reach the valve necessitated squeezing down between the cotton to the floor. Under these circumstances and the difficulties which they necessarily created we think the proof was such as would have reasonably justified the jury in concluding that the negligent acts of stowing the cotton high up around the hose and the hydrant and the valve connected with it created a condition so conducing to error of judgment and misdirected efforts as to render the railway company responsible therefor. And this conclusion is greatly fortified when the uncontradicted proof is considered that no general rules for the use of the fire apparatus had ever been promulgated, that no systematic inspection thereof had been made, that no fire drill or instructions as to the use of the apparatus was had or given, and that the too few watchmen were left in case of an emergency to use an apparatus which, even if it were intrinsically adequate,

was surrounded by the act of the company with such conditions that its favorable and efficient use was rendered practically impossible.

This leaves for consideration only the question whether the case should have been allowed to go to the jury on the question of deviation. As the result of the conclusions to which we have come on the question of negligence is that a new trial must be granted, it follows that on the new trial the whole case will be open. Being so open, we cannot say that testimony may not be introduced at the new trial which may modify the aspect of this question as exhibited in the record now before us. Conducive, however, to the result that there may be an end to this litigation, we content ourselves on this branch of the case at this time with saying that we think the proof in this record fully justified the action of the trial court in respect to the question of deviation.

The judgments must be reversed and the cause remanded to the Circuit Court of the United States for the Southern District of New York with directions to set aside the verdict and grant a new trial.

And it is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.